SUPREME COURT OF THE UNITED STATES.

No. 273.

THE FARMERS' MUTUAL INSURANCE COMPANY OF PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

THOMAS NICHOLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 UNITED STATES, *Eastern District of Pennsylvania, sct:*

The President of the United States to the Judges of the Circuit Court of the United States in and for the eastern district of Pennsylvania, greeting:

Because, that in the record and process and also in the rendering of judgment in a suit before you, between Thomas Nichols, a citizen of the State of New York, and The Farmers' Mutual Fire Insurance Company of Pennsylvania, citizens of the State of Pennsylvania, defendants in a plea of debt, a manifest error has intervened to the great damage of the said The Farmers' Mutual Fire Insurance Company of Pennsylvania, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the judges of the Supreme Court of the United States, at Washington, District of Columbia, on the first Monday of December next, that the record and process aforesaid being inspected, they may cause to be done thereupon, what of right ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourteenth day of May, A. D. one thousand eight hundred and sixty-seven, and in ninety-first year of the independence of the United States.

[SEAL.] BENJ'N PATTON,
Clerk C. C. U. S. E. D. of Pa.

2 Service of citation waived.
May 14, '67.

DAVID W. SELLERS,
Att'y for Thomas Nichols.

Endorsed: Thomas Nichols *v.* Ins. Co. Writ of error. Rec'd May 14, '67.

3 Pleas before the honorable the judges of the Circuit Court of the United States in and for the eastern district of Pennsylvania, in the third circuit of April Sessions, 1866, No. 9.

It is thus contained:

Be it remembered, that on the eighteenth day of June, Anno Domini one thousand eight hundred and sixty-six, David W. Sellers and George W. Biddle, esquires, attorneys of said court, come into the said court and sue forth a writ of summons, which said writ, being read, is in the words following, to wit:

4 UNITED STATES, *Eastern District of Pennsylvania, sct:*

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summons The Farmers' Mutual Insurance Company of Pennsylvania, citizens of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the Circuit Court of the United States, in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court, to be holden at Philadelphia, on the first Monday of July next, to answer to Thomas Nichols, a citizen of New York, in a plea of debt. And have you then there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this eighteenth day of June, A. D. 1866, and in the ninetieth year of the independence of the United States.

[SEAL.] W. GRIER HIBLER,
Pro. Clerk of Circuit Court U. S.

[50-cent U. S. int. rev. stamp.]

JUNE 21, 1866.

Served the within writ personally on W. G. Wagner, chief clerk of the Farmers' Insurance Co., by making known the content thereof, and by exhibiting the same to him, and by leaving with him a true and attested copy.

So answers.

THOS. S. CROMBARGER,
D'p'ty Marshal.

Endorsed: No. 9. Circuit Court, April session, 1866. Thomas Nichols, a citizen of New York, *vs.* The Farmers' Mutual Insurance Company of Pensylvania. York. Summons. Debt. Returnable on the first Monday of July next. David W. Sellers, George W. Biddle, attorneys for plaintiff. Filed 30 June, 1866. $2 90.

5 And afterwards, to wit, on the twenty-second day of October, in the year eighteen hundred and sixty-six, the said Thomas Nichols, by David W. Sellers and George W. Biddle, esquires, his attorneys, complains that The Farmers' Mutual Fire Insurance Company of Pennsylvania, citizens of Pennsylvania, were summoned to answer Thomas Nichols, a citizen of New York, of a plea of debt, and thereupon the said plaintiff, by his attornies, complains—

For that whereas heretofore, to wit, on the second day of October, 1865, by a certain deed, poll, or policy of insurance then made and sealed with the seal of the said defendants, (and which said deed, poll, or policy, so sealed, the plaintiff now brings here into court, bear-

6 ing date the day and year aforesaid,) after reciting that in consideration of one hundred dollars, (which then was paid by the said plaintiff to the said defendants,) it was by said deed, poll, or policy then declared that said defendants did insure the said plaintiff

against loss or damage by fire, to the amount of four thousand dollars, on a certain property as described in application and survey No. 17,676, and which was declared to be a part of said policy, and a warranty on the part of the said assured, the said plaintiff, to wit, on his three storied wooden-roofed building, 26+50 ft., situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango county, Pennsylvania, and occupied as a hotel $3,000
On his household furniture therein 1,000

$4,000

And the said defendants, by said deed, poll, or policy of insurance, did promise and agree to make good unto the said plaintiff all
7 such immediate loss or damage, not exceeding the amount insured, nor two-thirds the appraised value of any building above the foundation, as should happen by fire to the property in said deed, poll, or policy of insurance specified, from the 9th day of October, 1865, (at 12 o'clock noon,) unto the 9th day of October, 1866, (at 12 o'clock noon,) the said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same should happen, and to be paid within three months after notice, proof, and adjustment thereof, in conformity to the conditions annexed to said deed, poll, or policy of insurance; and it was by said deed, poll, or policy of insurance declared, that the said defendants should not be liable to make good any loss or damage by fire which should happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and it was also thereby declared, that said deed, poll, or policy of insur-
8 ance was made and accepted in reference to the application and the conditions thereto annexed, as by the same, reference thereto being had, will more fully appear.

And the said plaintiff saith that at the time of the making of the said deed, poll, or policy of insurance, he was interested in the said insured premises and household furniture to a large amount, to wit, to the amount $10,000, and remained and continued so interested therein from the making of the deed, poll, or policy of insurance, until the loss and damage hereafter mentioned.

And the said plaintiff saith that the said premises and the household furniture therein, afterwards, to wit, on the first day of February, 1866, were burnt down and consumed and destroyed by fire, which did not happen by invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said
9 plaintiff then sustained damage and loss to a large amount, to wit, to the amount of $3,000, so assured on the the three-storied wooden-roofed building, as aforesaid, and to the amount of $1,000, as assured, on the household furniture therein, as aforesaid.

And the said plaintiff saith that he did forthwith, after the loss and damage, to wit, on the 10th day of February, 1866, give notice

to the said defendants, and did as soon after as possible, to wit, on the 18th day of February, 1866, deliver a particular account of his loss and damage to the said defendants, and was ready and willing to prove the same in such manner as the defendants should require.

And the said plaintiff saith that he did, at the end of three months thereafter, claim of and from said defendants the amount of such loss or damage.

And the said plaintiff saith that, although he had in all things conformed himself to, and observer all the things and stipu-
10 lations which on his part were to be observed and performed according to the effect of said deed, poll, or policy of insurance, yet the said defendants, contrary to the force and effect of the said deed, poll, or policy insurance, have not paid said sum of $4,000, or any part thereof, but refuses so to do, to the damage of plaintiff $5,000; hence this suit.

And the said defendants, The Farmers' Mutual Fire Insurance Company, by J. Hill Martin and George M. Wharton, esquires, their attorneys, come and defend the wrong and injury, &c, and crave oyer of the said policy of insurance and the conditions thereon endorsed, and of the application, interrogatories, and answers thereto made by the plaintiff; which oyer being granted, and the same being severally seen and read, are as follows, to wit:

11 Application of Thomas Nichols, of Franklin, in the county of Venango, State of Penn., for insurance against loss or damage by fire, by the Farmers' Mutual Fire Insurance Company, in the sum of four thousand dollars, for the term of one year from the ninth day of October, 1865, at noon, on the property below specified, the value of the property being estimated by the applicant.

	Estimated value.	Insured value.
On his three-storied wooden-roofed building, 26x50 feet, situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango county, Penn., and occupied as hotel	5,000	3,000
His household furniture therein		1,000
		$4,000

Am't of premium note, $ 10-100; premium paid, $100; policy and survey, $; tax, $.

The said applicant make the following statements, and give the following answers to interrogatories here put relative to the risk, as a warranty on the part of the assured.

1. Of what materials is the building and roof constructed? If of brick, are the party walls entire, and do they run through the roof or above?

1. All wood and wooden roof.

2. In what town, district, and street is it situated, and by what number known?

2. As above stated.

3. State the distance to other buildings; for what are the nearest buildings occupied, and of what materials are they built and roofed.

3. A frame hotel adjoins on the south, 8 feet E.; W., a frame store-house; 18 ft. N. E., frame wash-house 45 feet north, frame stable; west and nothwest, no exposures.

4. Are there any other exposures within 100 feet? If so state what they are, and how occupied.

4. No.

5. Are your stoves, chimneys, and apparatus for lighting and heating the building safely put up and provided with the usual preventives against accident by fire?

5. Yes.

6. Where are ashes kept?

6. Away from the buildings.

7. Give size of buildings, and number of stories.

7. 26x50 ft.; 3 stories high.

8. How or for what purposes are the buildings occupied?

8. As a public house or hotel,

9. If personal property, on which floor is it to be insured?

9. On all floors.

10. Is the property now insured? If so, at what office, for what amount, and at what rate?

10. No.

11. In whose name is the title of the premises?

11. My own.

12. Is it incumbered? If so, state the amount, and also the estimated value of the real estate covered by said incumbrance.

12. Yes; $1,000 by mortgage, Jan'y, 1866.

13. Are all the facts material to the risk made known?

13. Yes.

Policy No. 17,676.

YORK, PA., 186 .

And the undersigned, applicant for the proposed insurance, hereby covenant and agree with this company to accept of the policy issued upon this application and survey, if in accordance therewith, and in case of loss, to adjust the same in accordance with the by-laws of the said company, and conditions of said policy. But if any untrue answer has been given to the foregoing interrogatories, whereby the said company have been deceived as to the character of the risk, or if any change be made, so as to increase the risk of these premises, without being notified to this company, and endorsed upon their policy, then this insurance to be void and policy of no effect. It is also agreed, if the company elect, that by returning the premium for the unexpired term of this insurance, and by giving fifteen days notice of their intention to do so, this insurance shall thenceforth cease. THOMAS NICHOLS, *Applicant.*

Attest: J. H. HILLIARD, *Agent.*

☞To whom is this policy to be sent? P. O. county, State of .

☞Address of the applicant: Franklin P. O., Venango county, State of Pa.

12 The following questions must be answered fully and definitely by the agent; and when this is not done the application will be declined:

1. Has this company any other insurance in this building, or within 150 feet? If so, for whom and what amount, and how near?
2. Do you consider it a desirable risk?
3. Have you examined the property on which insurance is wanted?
4. Are the answers by the applicant all correct, so far as you can discern?

——— ———, *Agent.*

Give a ground plan of the buildings if exposed by others, and state of what materials the nearest buildings are constructed and roofed, and how occupied.

NORTH.

Endorsed: No. . Application of Thos. Nichols; sum insured, $4,000. Approved by D. Stickler, Geo. D. Ebert, directors.

13 No. 17,676. $4,000

The Farmers' Mutual Fire Insurance Company of Pennsylvania.

By this policy of insurance, in consideration of one hundred dollars, and of the premium note of dollars, do insure Thomas Nichols, of Franklin, in the county of Venango, and State of Penn'a, against loss or damage by fire to the amount of four thousand dollars on the following property, as described in application and survey, No 17,676, which is hereby declared to be part of this policy, and a warranty on the part of the assured, viz: On his three-storied, wooden-roofed building, 26+50 ft., situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango co., Pa., and occupied as hotel $3,000
On his household furniture therein 1,000

$4,000

And the said company do hereby promise and agree to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding the amount hereby insured, nor two-thirds the appraised value of any building above the foundation as shall happen by fire to the property as above specified, from the ninth day of October, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) unto the ninth day of October,

one thousand eight hundred and sixty-six, (at 12 o'clock at noon,) the said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within three months after notice, proof and adjustment thereof, in conformity to the conditions annexed to this policy, provided always, and it is hereby declared, that in case the assured shall already have any other insurance against loss by fire on the property hereby insured, not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, and contains a just, full and true exposition of all the facts and circumstances, condition, situation and value of the property insured.

And that if any fact or circumstance shall not have been fairly represented; or if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary, and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease and be of no effect. The assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property, without reference to the dates or validity of the different policies, or the solvency of the different companies insuring; and whenever this company shall pay any loss, the assured agrees to sign over all his right to recover satisfaction therefor, from any other person or persons, town or other corporation, or to therefor at the charge or for account of the company, if requested.

This corporation shall not be liable to make good any loss or damage by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

Privilege to keep gunpowder, camphene, fluid or pine oil for sale must be endorsed on this policy; and if steam be used in or about said premises and the boiler burst, or if any property hereby insured be struck by lightning, or damaged by explosions from any cause whatever, this company shall not be liable unless fire ensues, and then for the loss by fire only.

And it is further declared, that this insurance is not intended to apply to, or cover any books of account, written securities, deeds, or other evidences of title to property; nor to bonds, bills, notes, or other evidences of debt; nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, spirituous liquors, paintings, patterns, plate, precious stones, printed music, prints, sculptures, statuary and watches, are not deemed to be included in any insurance, unless particularly specified in writing in this policy.

And it is moreover agreed and declared, that this policy is made and excepted in reference to the application, also the conditions hereto annexed, which are hereby made a part of this policy, and to

be used and resorted to, in order to explain the rights and obligations of the parties hereto.

In witness whereof, the said Farmers' Mutual Fire Insurance Company have caused these presents to be sealed with their seal, and signed by their president and secretary, at their office, in York, Pennsylvania, the second day of October, one thousand eight hundred and sixty-five.

[SEAL.] H. KRABER, *President.*
D. STRICKLER, *Secretary.*

[Stamp.]

☞ Please read the conditions and examine the policy, and if not correct, return it immediately for alteration.

For value received, hereby transfer, assign, and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of

[SEAL.] ——— ———, *Secretary.*

Approved, sealed and delivered in presence of—

——— ———

For value received, hereby transfer, assign, and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of

[SEAL.] ——— ———, *Secretary.*

Approved, sealed and delivered in presence of—

——— ———

Endorsed: No. 17,676. Farmers' Mutual Fire Insurance Co. of Pennsylvania. Thos. Nichols, Franklin, Pa. Amount, $4,000 insured. Premium note, $——. Premium, $100 00. Expenses, $1 50. Expires, Oct. 9th, 1866. Office, East Main street, York, Pa. In communicating with the office, send the No. of your policy. [Read your policy.]

Conditions of Insurance.

1. Applications for insurance shall specify the construction and material of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction or materials; whether any manufacturing is carried on within or about it; the applicant shall also state the true cash value of the property to be insured, and the incumbrance (if any) on the same; also the nature of the interest to be insured, if other than fee simple title and ownership; also any other facts relating and material to the risk. And the said valuation, description

and survey shall be taken, and deemed to be the act of the insured, and a warranty on his, her, or their part, and said warranty shall apply to all the property insured, whether real or personal.

A false description of, or omission, to make known in said application any fact or feature relating to the risk, which, if known, would induce the company to reject said application, or would in their estimation increase the hazard of the same; or an over valuation of the property or interest to be insured, shall render absolutely void, any policy issued upon such description or valuation.

2. If, after insurance, either by the original policy or the renewal thereof, the risk shall be increased by any means whatsoever, or if the property shall be used or occupied so as to render the risk more hazardous than at the time of insuring, and the assured shall neglect or fail to pay such additional premium as the company shall determine, and obtain the written consent of the company to a continuance of the policy, such insurance shall be void, and of no effect.

3. It shall be optional with the company to terminate the insurance, after notice given to the insured, or his representative, of their intention to do so; in which case the company shall refund the unearned portion of the premium.

Any building insured by this policy becoming vacant or tenantless for a period of fifteen days, notice thereof must be immediately given to the secretary, and his consent obtained thereto in writing, otherwise this policy shall be void.

4. Property held in trust, or on commission, must be insured as such; otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the proofs of such loss, together with their respective interests therein, certified by them. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other interest, not fee simple absolute, it must be so stated in the policy, otherwise the same shall be void.

5. No insurance, whether original or continued, shall be considered as binding until the actual cash payment of the premium.

6. Policies of insurance, subscribed by this company, shall not be assignable in whole, or in part, without the written approval of the secretary, and the payment of fifty cents recording fees; and in case of any transfer of interest in this policy, or any part thereof, either by sale or otherwise; or if the property herein insured, or any part of it, shall be transferred by any contract, or any change of partnership or ownership, whether prior or subsequent to any loss or damage to the property insured, without the written consent of the secretary, this policy shall thenceforth be void, and of no effect.

7. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they fail to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood and agreed, that there can be no abandonment to the insurers of the subject insured; and also, that this com-

pany, or their agent, have the right to examine and take account of the property saved, and that every facility be given to enable them to do so.

Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

This company will not be liable for any loss or claim for stolen goods, or for any other property that may be stolen, nor for any loss that may happen through the gross, wanton or wilful misconduct of the insured, or through his gross or culpable negligence, or by means of his intoxication.

8. No repairs or alterations in the premises shall be made after a fire, until notice is given to the company, and they have had an opportunity to view and examine.

9. In any case where the consent of this company is granted to a transfer of the policy as collateral security, then in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss in their own name as herein specified, and fully comply with all the conditions and requisitions as herein contained, as much so as if the policy had never been assigned; otherwise this policy shall be void, and of no force or effect whatever, and all liability on the part of this company shall cease.

10. Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company. And as soon after as possible they shall deliver a true copy of the written part of their policy with the endorsements thereon (if any), and a particular account of their loss and damage, rendering to this company a schedule or list of articles destroyed or damaged, stating item by item, and article by article, together with the actual cash value of each article or item, respectively, at the time of such loss, signed with their own hands, which said account shall set forth the whole cash value of the subject insured; the loss and damage claimed thereon; who are the owners thereof; if encumbered, stating how and to what amount; that at the time of, and immediately before the fire, the subject insured was in, upon, or at the place or location specified in the written part of this policy, and covered thereby, and that the same was either destroyed or damaged (as the case may be) by fire. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any or what other insurances have been made on the same property; and giving a copy of the written portion of the policy of each company with the endorsements thereon; in what general manner, (as to the trade, manufactury, merchandise or otherwise,) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when or how the fire originated, so far as they know or believe or have any information.

Where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind, and the estimated amount of damage which each article has sustained. The damage shall then be ascertained by the examination and appraisal of each article, by two disinterested appraisers, under oath, one chosen by the company, and one by the insured, and in case of their disagreement as to the amount of damage upon any article, they shall nominate a third person to act as umpire between them, whose detailed report in writing shall form a part of the preliminary proofs required to be furnished by the claimant; and if this company or their agent shall require such an examination or appraisement, it shall be so submitted, otherwise this company will not be liable for any loss or damage under this policy, and upon the neglect or refusal of the assured to nominate an appraiser and submit thereto, in accordance with the condition of this article of agreement, then all claim or claims for loss or damage, by virtue of this policy, to cease and be of no force and effect.

And whenever required, the insured or person claiming, shall produce and exhibit the books of account, bills of purchase or duplicates thereof, and other vouchers, to the insurers or their specially authorized agent, at the office of this company, or at the office of such agent, in support of the claim, and leave them with this company a sufficient length of time to permit extracts and copies thereof to be made. And also exhibit to any person or persons named by this company, and permit to be examined by them, any property damaged on which any loss is claimed. And shall also, if required, submit to an examination under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, and subscribe and make oath to such examination, the same being reduced to writing. And until such proofs, examinations, declarations, certificates and exhibitions are produced, and permitted by the claimant, when required as above, the loss shall not be payable.

Any misrepresentation or concealment, fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this company under the within policy. And said company shall in no case be deemed to have waived a full, literal and strict compliance with, and performance of each and every of the terms, provisions, conditions and stipulations in this policy contained, and hereto annexed, to be performed and observed by and on the part of the insured, and every person claiming by, through or under them, unless such waiver be express, and manifested in writing, under the signature of the secretary of said company. And no agent of this company shall have power to violate any of these conditions.

14 11. The estimated value of any building, as given by the insured and set forth in the application, shall not, in case of

loss, be conclusive evidence of the real value of said building. But in case any dispute or difference arise touching such valuation, it shall, at the election of said company, be referred or submitted to the judgment of impartial appraisers, of whom the company shall select one, and the said insured shall select a second; and the said two appraisers, in case of their disagreement upon the matter so submitted to them, shall nominate a third person to act as umpire between them, and the report in writing, under the hands and seals of said appraisers, or any two of them, shall be binding and conclusive as to the matter of valuation so submitted, upon both parties to this policy; and whenever the matter shall have been so submitted as aforesaid, the insured shall not be entitled to recover more than two-thirds the amount of said appraisers report or valuation; but such award shall not decide the liability of this company under this policy.

12. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do, witbin 30 days after having received the proofs of loss required by the conditions of this policy. And in case any dispute or difference shall arise or occur, touching any loss or damage under this policy, or the relative condition or value of said property, when rebuilt, repaired, or replaced, it may at the election of said company, be referred or submitted to the judgment of two impartial arbitrators, of whom the company shall select one, and the said insured shall select a second; and the said two arbitrators, in case of disagreement upon the matters so submitted or referred to them, shall nominate a third person to act as umpire between them, and the award in writing, under the hands and seals of such arbitrators, or any two of them, shall be binding and conclusive as to the matter so submitted, upon both parties to this policy, and in case the said company shall require such submission to arbitration, the said difference or dispute shall be so submitted, but not otherwise.

13. Payment of losses shall be made at the end of three months after the loss shall have been ascertained, proved and adjusted, as required by those conditions.

14. It is furthermore hereby expressly provided that no suit or action of any kind against the company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after the cause of action shall have accrued, and in case any such suit or action shall be commenced against said company, after the expiration of six months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

15. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial

stone or brick chimneys, or in consequence of neglect or deviations from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist, or for any damage caused by fire originating from depositing ashes or embers in wooden vessels.

16. The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity, and should there, during the life of this policy, an encumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of this company thereto, then and in that case the policy shall be void.

15 Whereupon the said defendants plead "non est factum."

And for a further plea in this behalf the said defendants plead payment with leave, &c.

And for a further plea in this behalf the defendants by leave, &c., say that at the time of making the said application in the said declaration mentioned, the said plaintiff made, among other things, the following statement in an answer to one of the interrogatories then and there propounded by the defendants to him, to wit: "In whose name is the title of the premises?" (Meaning thereby the said building then and there sought to be insured,) by that the said title was in his the said plaintiff's, own name, which said statement and answer the said defendants aver was then and there untrue and false, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

16 And for a further plea in this behalf, the said defendants say that the interest of the said plaintiff in the said building sought to be insured as aforesaid, was not, at the time of making the said application and the said policy, a fee simple absolute, but, on the contrary, was a leasehold, and that the interest of the said plaintiff was not so stated in the said policy, and this the said defendants are ready to verify; wherefore, they pray judgment, &c.

And afterwards, to wit, on the seventh day of December, in the year last aforesaid, the said plaintiff, by his [his] attorneys, comes into court here, and reply to the said pleas of the said defendants, which said replication being filed, is in the words and of the tenor following, to wit:

17 1. And plaintiff, to the first plea by defendants pleaded, wherein they put themselves upon the country, doth the like.

2. And plaintiff to the second pleas replied non solvit, and this he prays may be inquired of by the country.

3. And to the third plea plaintiff saith, that at the time of making said application, the said policy in the said building then and there sought to be insured was in the said plaintiff's own name, and this he prays may be inquired of by the country.

4. And to the fourth plea, plaintiff saith that his interest in said building, insured by defendants at the time when, &c., an absolute

interest, and not a leasehold, and this he prays may be inquired of by the country.

18 And the said defendants, as to the said replications of the said plaintiff, by him thirdly and fourthly above pleaded, and whereby he hath put himself upon the country, do the like.

Additional pleas.

5. And for a further pleas in this behalf the said defendants, by leave, &c., say that the interest of the said plaintiff in the said building sought to be insured, as aforesaid, was not at the time of making the said application and the said policy a fee simple absolute, but was another interest, which said other interest of the said plaintiff was not so stated in the said policy, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

6. And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of the said application and of mak-

19 ing the said policy, the said building was used by the said plaintiff as a place for selling vinous and spiritous liquors without license therefore in due course of law, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

7. And for a further plea in this behalf the said defendants, by leave, &c., say that after the making of the said policy, the said plaintiff used the said building as a place for selling therein vinous and spiritous liquors without license therefore in due course of law, by means thereof the risk was changed so as to make it more hazerdous than it was at the time of insuring, and the said plaintiff then and there failed to give immediate written notice thereof to the secretary of the said defendants and obtain his written consent to the continuance of the said insurance, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

20 8. And for a further plea in this behalf the said defandant, by leave, &c., say that the said plaintiff, after sustaining his said alleged loss or damage by fire, did not forthwith give notice thereof in writing to these defendants, and this they are ready to verify; wherefore they pray judgment, &c.

21 And the plaintiff, to the plea 5th pleaded, comes and says, &c., that his interest in said building insured by defendants at the time when, &c., was an absolute fee simple interest, and this he prays may be inquired by the country.

And the plaintiff demurs to the plea 6th pleaded, and assigns for cause, that the facts set forth in said plea are wholly immaterial, and do not traverse any averment of said declaration.

And plaintiff, to the plea 7th pleaded, comes and says, that the risk of the defendants was not changed after the day of the date of the said deed, poll, or policy of insurance, and this he prays may be inquired of by the country.

And plaintiff, to the plea 8th pleaded, comes and says, that after sustaining his losses in said declaration averred he did give notice thereof in writing to said defendants, and this, he prays, may be inquired by the country.

22 And afterwards, to wit, on the twenty-ninth day of December, A. D. 1866, the said defendants, by their attorneys, come and file additional pleas, which said pleas, being read, are in the words following, to wit:

9. And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of making the said application in the said declaration mentioned, the said plaintiff made, among other things, the following statement, in an answer to one of the interrogatories then and there propounded to him by the defendants, to wit: "In whose name is the title to the premises?" (Meaning thereby the said lot or piece of ground upon which the said building then and there sought to be insured was erected,) viz: that the said title was in his the said plaintiff's own name, which said statement and answer, the said defendants aver was then and there untrue and false, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

23 And for the further plea in this behalf the said defendant, by leave, &c., say that at the time of the said application, and of making the said policy, the said building was, without the knowledge of the defendants, used by the said plaintiff as a house of ill-fame, by means whereof the hazard was increased, and that the said plaintiff then and there failed to give notice thereof to the said defendants, and this the said defendants are ready to verify; wherefore they pray judgment, &c.—

11. And for a further plea in this behalf the said defendants, by leave, &c., say that after the making of the said policy, the said plaintiff used the said building for a house of ill-fame, by means whereof the risk was changed so as to make it more hazardous than it was at the time of insuring; and that the said plaintiff then

24 and there failed to give immediate written notice thereof to the secretary of the said defendants, and obtained his written consent to the continuance of the said insurance; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

And afterwards, to wit, on the second day of January, in the year of our Lord 1867, the said defendants, by their attorneys aforesaid, file their rejoinder and amended sixth plea, which, being read, is in the words and of the tenor following, to wit:

25 And the said defendants, as to the replications of the said plaintiff by him fifthly, seventhly, and eighthly above pleaded, and whereby he hath put himself upon the country, doth the like.

Amended 6th plea.

And for a further plea in this behalf, the said defendants by leave, &c., say that at the time of the said application, and of making the said policy, the said building was, without the knowledge of the defendants, used by the plaintiff as a place for selling vinous and spiritous liquors without license therefore in due course of law, by means whereof the hazard was increased, and the said plaintiff then

and there failed to give notice thereof to the said defendants, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

26 And afterwards, to wit, on the fourth day of January, in the year of our Lord one thousand eight hundred and sixty-seven, the said plaintiff, by his attorneys aforesaid, files his replication to the ninth, tenth, and eleventh pleas, which, being read, is in the words following, to wit:

And the plaintiff comes and says to the plea of the said defendants 9thly pleaded, that the statement made by him in answer to the interrogatory referred to in said plea was true; and this he prays may be inquired of by the country.

And the plaintiff comes and says to the plea of the said defendants 10thly pleaded, that at the time of the said application and of making the said policy, the said building was not used as a house of ill fame, and this he prays may be inquired of by the country.

27 And the said plaintiff, to the plea of the said defendants 11th pleaded, comes and says, that after the making of the said policy he did not use the said building as a house of ill-fame, and this he prays may be inquired of by the country.

And afterwards, to wit, on the fifth day of the month, and year last aforesaid, the said defendants, by their attorneys, file their rejoinder, which said rejoinder, being read, is as follows, to wit:

And the said defendant, as to the said replications of the said plaintiff by him, ninthly, tenthly, and eleventhly above pleaded, and whereby he hath put himself upon the country, doth the like.

28 And afterwards, to wit, on the tenth day of the month and year last mentioned, the said plaintiff, by his said attorneys, files his replication to the amended sixth plea, and notice to defendants to produce papers, which, being read, is in the words following, to wit:

Plaintiff replies to the plea 6thly, pleaded by said defendants, and says that said building was not, at the time of the said application and of making the said policy, used as a place for selling vinous and spiritous liquors without license therefor; and this he prays may be enquired of by the country.

And defendants are hereby notified that (1) at the trial of the above case they will be required to produce the application and survey, No. 17,150, on which a policy of insurance was effected in the sum of $3,000, of the date of August 9, 1865.

29 2. The proofs submitted of the loss of the plaintiff by fire under the policy declared upon.

3. All of the letters which were sent by the plaintiff to the defendants after his loss.

And afterwards, to wit, on the seventeenth day of the month and year last aforesaid, the defendants, by their attorneys aforesaid, come into court here and file their rejoinder, which, being read, is as follows, to wit:

And the said defendants, as to the said replication of the said plaintiff by him sixthly above pleaded, and whereby he hath put himself upon the country, doth the like.

30 In the Circuit Court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1866.

THOMAS NICHOLS, a citizen of New York, plaintiff,
vs.
THE FARMERS' MUTUAL FIRE INSURANCE COMpany of Pennsylvania, citizens of Pennsylvania, defendants. } No. 9.

The President of the United States to J. MILTON BONHAM, esquire, Franklin, Venango county, Pennsylvania:

Know ye, that in confidence of your prudence and integrity, we have given unto you, and by these presents do give unto you, full power and authority, in pursuance of a rule lately made in the Circuit Court of the United States in and for the eastern district of Pennsylvania in the third circuit, in a certain action of debt therein depending, wherein the said Thomas Nichols is plaintiff, and The Farmers' Mutual Fire Insurance Company of Pennsylvania are defendants, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said defendants as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up, and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this thirteenth day of February, A. D. 1867, and in the 91st year of the independence of the said United States.

[SEAL.]

W. GRIER HIBLER,
Clerk of Circuit Court.

The execution of this commission appears in a certain schedule hereunto annexed.

J. MILTON BONHAM,
Commissioner.

31 In the Circuit Court of the United States for the eastern district of Pennsylvania in the third circuit.

THOMAS NICHOLS	U. S. Circuit Court for the eastern district of Pennsylvania, April sessions, 1866. No. 9.
vs.	
THE FARMERS MUTUAL FIRE INSURANCE Company of Pennsylvania.	

The defendants enter a rule for a commission to be issued in the above case to Franklin, Venango county, Pennsylvania, to take the depositions of such witnesses as may be produced, sworn, and examined on behalf of the defendants, on fifteen days notice to the plaintiff. And defendants file the following interrogatories to be propounded to the witnesses, and name as commissioner on their behalf, J. Milton Bonham, esquire, counsellor-at-law, Franklin, Ve-
32 nango county, Pennsylvania.

1. State your name, age, residence and occupation, and how long you have followed such occupation. Do you know the plaintiff? If aye, how long have you known him? Where did he reside when you knew him? What business did he follow, and where does he live now?

2. Do you remember the destruction by fire of the hotel or building occupied by the plaintiff in the town of Franklin, Venango county, Pennsylvania, in January or February, 1866? If aye, state at what time the fire occurred, and the extent of the loss, total or otherwise, and the cause of the fire. What kind of a building was the property destroyed? Describe it fully.

3. State, if you know, when the building occupied by the plaintiff as aforesaid was erected, and by whom. When did the plaintiff first occupy said building? What kind of a structure was on the
33 premises previous to his occupation of the same? Who owned the said premises before the said plaintiff occupied the same? State whether the said plaintiff was the owner in fee simple of the said premises, or upon what terms and conditions he occupied or had possession of the same. Give all your knowledge and information on this point. In whose name was the title of the said premises on the second day of October, 1865; on the fifth day of October, 1865, and on the first day of February, 1866.

4. What was the nature and character of the business carried on by the said plaintiff in the said building destroyed by fire during his occupancy thereof and previous to its destruction? If you say he used it as a hotel, state whether vinous or spirituous liquors were sold therein on the second and fifth days of October, 1865, or at either of those times, or at any time or times prior thereto or thereafter, and before the destruction of the said building by fire.

34 5. What kind or character of house did the plaintiff keep from the early summer of the year 1865 down to the time of its destruction by fire, or during any portion of said time; was it an orderly and quiet, or disorderly and noisy place of resort? What kind or description of persons, if any, frequented it? What was done in said house by those who frequented it? Was there attached to the

house any sign or description of the character of this building? If so, what was it? State also what effect, if any, on the risk of insurance beyond that of insuring a hotel was produced by the kind of persons who frequented it, or by what was done or carried on in the building at any time between the early summer of 1865 and its destruction by fire?

6. Do you know any other matter or thing which may be of benefit to the defendants in the above case? If so, state the same fully as if you had been specially interrogated thereto.

J. HILL. MARTIN,
G. M. WHARTON, *for Def'ts.*

35 U. S. Cir. Ct., April Sess., 1866.

NICHOLS *vs.* INS. CO. } 9.

Plaintiff's cross-interrogatories on defendants rule for a commission to Franklin, Venango county, Pennsylvania.

I. Do you know the nature of the interest of the said plaintiff in the building destroyed by fire?

II. Did you visit the house of plaintiff before it was destroyed by fire? If so, how frequently?

III. Are you a stockholder of the defendant corporation?

IV. Have you had any dealings with defendants? If so, of what kind?

DAVID W. SELLERS.
GEO. W. BIDDLE.

Feb'y 12, '67.

A true copy from the record.

W. GRIER HIBLER,
Pro Clerk C. C. U. S.

36 Deposition of witnesses produced, sworn and examined, on the sixth day of March, A. D. 1867, at the office of J. Milton Bonham, in the borough of Franklin, county of Venango and State of Pennsylvania, by virtue of a commission issuing from the Circuit Court of the United States for the eastern district of Pennsylvania, to J. Milton Bonham, directed for the examination of witnesses in a certain cause depending in the said court, wherein Thomas Nichols, a citizen of New York, is plaintiff, and the Farmers' Mutual Fire Insurance Company of Pennsylvania, citizens of Pennsylvania, is defendant:

John H. Smiley, of the borough of Franklin, county of Venango, and State of Pennsylvania, aged fifty-two years or thereabouts, being produced, sworn, and examined on behalf of the defendants, deposeth as follows:

1. To the first interrogatory on the part of the defendants, he answers as follows: My name is John H. Smiley; my age is

37 fifty-two years; my residence, Franklin, Pennsylvania. For two years past I have been the agent of the Jamestown and Franklin Railroad Company; previous to that, for about three years, I was general real estate agent. As real estate agent I have had charge of the real estate of Mrs. Sarah M. Mayer, widow of Jacob Mayer, dec'd, for the past five years.

I am acquainted with Thomas Nichols, the plaintiff. I have known him over two years; he resided in Franklin when I knew him. I think he was connected with the oil business, and kept hotel. I do not know where he lives now.

2. To the second interrogatory on the part of the defendant he answers as follows: I remember the destruction by fire of the building occupied by plaintiff; it occurred in February 1866. I forgot the day, but it was one to three o'clock in the morning; the loss was a to-
38 tal loss. I do not know the cause, but I believe it was set on fire. The front building was two story frame building thirty-six feet by twenty-four feet, erected about twelve or fifteen years ago. The building attached, or back building on the north of the front building, was a frame building about eighteen or twenty feet by thirty feet, three stories high. This was also a frame building, erected some time in the year 1865. The back building was built very cheap and unsubstantial.

3. To the third interrogatory on the part of the defendant he answers as follows: The front part of the building described in my preceeding answer was erected by Jacob Mayer, twelve or fifteen years ago. The back building (three story) on the north of the front building was built by Nichols, (the plaintiff,) in the spring or summer of 1865. The plaintiff first occupied the premises on or about the first of April 1865. The front building above described, with a small kitchen and a stable on the back end of the lot, were on the premises at the time of his occupation of the same and previous thereto. The heirs of Jacob Mayer, deceased, owned the premises before the said plaintiff occupied the same, and during the time he occupied the same. The plaintiff was never owner of the fee simple in said premises. Through myself, as agent, the plaintiff leased the premises from some parties who had leased from the heirs of Jacob Mayer, deceased. The lease was for five years from about the first of April, 1865, for the consideration of eighteen hundred dollars per annum, payable quarterly in advance. He was to deliver the property at the termination of the lease in as good order as he received it, usual wear and tear excepted. The title to the premises on the second day of October, 1865, was in the name of Ja-
39 cob Mayer, and likewise on the fifth day of October, 1865, and on the first day of February 1866.

4. To the fourth interrogatory in the part of the defendant, he answers as follows: The building was occupied as a public house—as a tavern—and by common reputation as a house of prostitution; liquor, vinous and spiritous, were sold on the premises by plaintiff all the time during his leave, or shortly after he occupied it, up to the time of the fire.

5. To the fifth interrogatory on the part of the defendant he answers as follows: The character of the house was bad; it was disorderly and noisy. A lower order of persons frequented it; there were women kept there. The sign attached to the building was "New York Hotel." I know that the risk was greaty increased beyond an ordinary hotel risk by the character of the persons frequenting it.

40 6. To the sixth and last interrogatory on the part of defendants, he answers as follows: As the agent for the heirs of Jacob Mayer, deceased, I went to the plaintiff some time before the fire to demand a surrended of the lease on account of the bad character of the house which he kept, and on account of the disorderly persons who frequented it, male and female. He then promised me he would expel those bad characters from his house, and keep a better house. On account of the character of the house, and on account of the complaint made by neighbors and citizens generally, and the fear of its being burned, we intended to eject him in accordance with the terms of the lease. The building Nichols erected was worth from fifteen to eighteen hundred dollars at the time of the fire.

JOHN H. SMILEY.

Subscribed before me. [Subscribed before me.]

J. MILTON BONHAM, *Com.*

Cross-int'a.

1. To the first cross-interrogatory of plaintiff he answers as follows: I do.

2. To the second cross-interrogatory of plaintiff he answers

41 as follows: I entered the house of plaintiff frequently to remonstrate with him, and see if I could'nt get him to keep a more orderly house. I suppose I went there toward the last about once a week.

3. To the third cross-interrogatory of plaintiff he answers as follows: No.

4. To the fourth cross-interrogatory of plaintiff he answers as follows: I never had any dealing with the defendant.

JOHN H. SMILEY.

Subscribed before me.

J: MILTON BONHAM,
Commissioner.

Robert Lamberton, of the borough of Franklin, county of Venango, State of Pennsylvania, aged fifty-seven or thereabouts being, produced, sworn, and examined on behalf of the defendants, deposeth as follows:

1. To the first interrogatory on the part of the defendant

42 he answers as follows: My name is Robert Lamberton; my age is fifty-seven; my residence is Franklin; I am a private banker, and am also one of the associate judges of the Court of Common Pleas of Venango county. I have been a banker about six years. I have been on the bench four years. I am acquainted with Thomas Nichols, the plaintiff. I knew him a few months previous to February, 1866.

I was acquainted with him from four to six months previous to the fire in February; he kept that house, a hotel in Franklin. I do not know where he lives now.

2. To the second interrogatory on the part of the defendant he answers: I remember the fire which burned the building of the plaintiff. I think the fire occurred on the morning of the first of February; it was from one to three o'clock in the morning, or perhaps from
43 twelve to two; it was a total loss. I do not known how the fire occurred but the report was that it was set on fire. When Mrs Mayer leased the house, (the property was owned by the heirs of John Mayes,) there was a good sized and good frame dwelling house on it, two stories, with a little kitchen in the rear. After it was leased there was another building put up adjoining it; the latter building was erected during the time Nichols occupied the lease. I did'nt consider the back building as very substantial; it was built on stone pillars and wooden posts.

3. To the third interrogatory on the part of the defendant he answers as follows: The front building was erected a number of years ago; over six years ago, to my knowledge. The rear building was erected, while Nichols was occupying the premise as a hotel. The front building above described was on the premises when Nichols went on the premises. The Mayes heirs owned property
44 when Nichols leased. Nichols was not the owner in fee fee simple to my knowledge. I don't know the terms or condition of the lease. I do not know in whose name the title was in October, 1865, or in February, 1866.

4. To the fourth interrogatory on the part of defendant he answers as follows: I think the building was used as a hotel or tavern. I have seen a bar and bottles in the front room as I passed by, but I can't say whether liquor was sold then or not.

5. To the fifth interrogatory on the part of defendant he answers as follows: The character of the house Nichols kept was bad. The house was disorderly and noisy. The reputation of many of the persons, especially the women, who frequented the house, was
45 bad. I do not know whether there was a sign at the house or not. I think the risk would be greater than if the building was used as an orderly hotel.

6. To the sixth interrogatory on the part of the defendant he answers as follows: I do not think a building of the kind Nichols built on the lease was worth more than two thousand dollars at the time of the fire.

ROBERT LAMBERTON.

Subscribed before me.

J. MILTON BONHAM,
Commissioner.

Cross. 1. To the first cross-interrogatory of plaintiff he answers as follows: I do not. I knew he leased, but don't know the condition of the lease.

2. To the second cross-interrogatory of plaintiff he answers as follows: I never visited the house whilst Nichols had it, but passed it frequently.

3. To the third cross-interrogatory on the part of plaintiff
46 he answers: I am not a stockholder of the defendant.

4. To the fourth and last cross-interrogatory of plaintiff he answers: I have been insured with the company defendant, and have had losses paid to me.

ROBERT LAMBERTON.

Subscribed before me.

J. MILTON BONHAM,
Commissioner.

Samuel Plumer, of the Borough of Franklin, county of Venango, and State of Pennsylvania, aged thirty-six years or thereabouts, being produced, sworn, and examined in behalf of the defendants, deposeth as follows:

1. To the first interrogatory on the part of the defendant he answers as follows: My name is Samuel Plumer; my age is thirty-six; my residence is Franklin, Venango county, Pennsylvania. I am a lawyer by profession. I have been practicing here for the
47 past six years. I am acquainted with the plaintiff. I knew him for six months previous to February, 1866. He resided in Franklin, and kept a hotel known as the "New York Hotel." I don't know his present residence.

2. To the second interrogatory on the part of the defendant he answers as follows: I remember the fire which burnt down the building occupied by plaintiff as a hotel. I think the fire was on the morning of the first of February, 1866; the loss was total; the building burned was a frame building.

3. To the third interrogatory on the part of the defendantshe answers as follows: There was a front and back building joining each other at the time the fire occurred. The front building, two stories high, was built some years ago by Jacob Mayer. The back building, three stories high, was built by Nichols some time du-
48 ring the [during the] year 1865. I don't know exactly when plaintiff first occupied the building, but it was some time in the year 1865. The two story front building, with a small kitchen attached, and a small stable in the rear end of the lot, were on the premises previous to and at the time of Nichols' occupation of the same. The heir of Jacob Mayes, deceased, owned the premises previous to plaintiff's occupying the same, and still own the same. The plaintiff was not the owner of the fee in the premises; he was a lessee. I do not know the terms or conditions of his lease. The title to the premises, on the first day of February, 1866, on the second day of October, 1865, and on the fifth day of October, 1865, was in the name af Jacob Mayes.

4. To the fourth interrogatory on the part of the defendant he answers as follows: Nichols was ostensably keeping a house of enter-

tainment and selling liquor, but it was generally reputed to
49 be a house of prostitution. This house was between my residence and office, and as I passed it five or six times a day I have seen persons drinking there frequently. I saw a bar and bottles in the front room; all this whilst in the possession of Nichols, and previous to the fire in February, 1865.

To the fifth interrogatory on the part of defendant he answers as follows: For first three months provious the fire plaintiff hept a very disorderly house. I think the worst house that was ever kept in our town. Generally those frequented it were of the lower order of persons. There was a sign attached to the building which read "New York Hotel." I think the risk was greatly increased over an ordinary and orderly hotel risk by the character of the house.

50 6. To the sixth interrogatory on the part of the defendants he answers as follows: The building erected by Nichols was of a very temporary character. I think two thousand dollars was far more than it was worth at the time of the fire. About two months before the fire I saw Nichols and called him into my office, and told him that the public were very much incensed at the character of the house he was keeping, and advised him to desist from keeping bad women about his house, or else the people would take it in hand.

SAM'L PLUMER.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

Cross.

1. To the first cross-interrogatory of plaintiff he answers as follows: I know he had a lease-hold estate, but I do not know the conditions of the lease. I know that Nichols erected a part of the building destroyed by fire, but whether the building was to remain there after the expiration of the lease or not not I do not know.

51 2. To the second interrogatory of plaintiff he answers as follows: I was in the house once whilst Nichols kept it. There was a fight going on in it, and I went to see what was the matter. I don't recollect that I went there at any other time.

3. To the third cross-interrogatory of plaintiff he answers as follows: No.

4. To the fourth cross-interrogatory of plaintiff he answers as follows: No.

SAM'L PLUMER.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

George Brigham, of the borough of Franklin, County of Venango and State of Pennsylvania, aged forty-one years or thereabouts, being produced, sworn, and examined on behalf of the defendant, deposeth as follows:

1. To the first interrogatory on the part of the defendant
52 deposeth as follows: My name is George Brigham; my age is

forty-one; my residence Franklin, Pennsylvania. I am by occupation an oil dealer. I have been an oil dealer for six months. Previous to that time, I was in the mercantile business. I am acquainted with Thomas Nichols, the plaintiff. I have been acquainted with him for two years. He resided in Franklin when I knew him. He kept the New York Hotel in Franklin. I do not know where he is now.

2. To the second interrogatory on the part of the defendant he answers as follows: I know of the fire that occurred on the morning of the first of February, 1866, at which the New York Hotel building was burned. The fire occurred, I think, about half past two o c'lock in the morning; the loss was total. I think the building was set on fire. The fire started at the northwest corner of the New York Hotel. The building destroyed was frame; a two story
53 building fronting on Liberty street, and a three story frame building attached back. The back building was poorly built—a cheap building.

3. To the third interrogatory on the part of the defendant he answers as follows: There were two buildings together. The front building, a two story frame building, was built by Jacob Mayes, deceased, some ten or twelve years ago; and the rear building, a three story frame building, was built by Mr. Nichols some time in the year 1865. The property belonged to the heirs of Jacob Mayes, deceased, when the plaintiff came into possession. Nichols was not the owner of the fee of the premises at any time. Nichols had a lease which he bought from other parties, (whose name I forget,) which parties got it from the heirs of Mayes. The lease was for five years at a yearly rental of eighteen hundred dollars, payable
54 quaterly in advance, and, if not paid within twenty days after due, and if not paid within that time, lessee to forfeit lease, and all the building, &c., thereon. The title to the premises on the second day of October, 1865, on the fifth day of October, 1865, and on the first day of February, 1866, was in the name of Jacob Mayes and belonged to his heirs.

4. To the fourth interrogatory on the part of the defendant he answers as follows: Plaintiff kept a hotel and was selling spiritous liquors up to the time of the fire.

5. To the fifth interrogatory on the part of defendant he answers as follows: The house kept by plaintiff was of a very bad character; it was both disorderly and noisy; it was frequented by bad characters—drunkards and gamblers by reputation. There were women of bad repute kept there also. There was a sign attached to the building—"New York Hotel." The risk was much greater than it would
55 have been if the hotel had been respectable and orderly.

6. To the sixth and last interrogatory on the part of the defendant he answers as follows: Shortly before the fire I called on Mr. Nichols, and called his attention to the character of his house and the feeling of the people against it. He promised me that he would

drive the bad women away and put a stop to the gambling going on there. But he never did so.

G. W. BINGHAM.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

Cross-in.

1. To the first cross-interrogatory by plaintiff witness answers as follows: The back building described by me above was put up by Nichols, but I think he was to leave it on the property at the expiration of the lease. The rest of the property he had a lease in for two years.

2. To the second cross-interrogatory by plaintiff witness
56 answers as follows: I visited the house of the plaintiff frequently, but never except on business.

3. To the third cross-interrogatory by plaintiff witness answers as follows: I am not.

4. To the fourth cross-interrogatory by plaintiff witness answers as follows: I never had.

G. W. BINGHAM.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

COMMONWEALTH OF PENNSYLVANIA, *County of Venango, ss:*

I, J. Milton Bonham, at the borough of Franklin, county and State aforesaid, at my office in said borough, do hereby certify that the witnesses, John H. Smiley, Robert Lamberton, Samuel Plumer, and George Brigham, prior to the taking of the several depositions, by virtue of the commission hereto attached, on the sixth day of
57 March, A. D. 1867, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth in relation to the matter in controversy in the seal mentioned in the caption of these depositions, and in the hereunto-attached commission, so far as they respectfully might be interrogated in relation thereto; and the said depositions were, on the said sixth day of March, A. D. 1857, in the said borough, county, and State, sworn to, taken, and reduced to writing by me, and signed by said witnesses in my presence.

Given under my hand and seal, at my office in Franklin, this sixth day of March, A. D. 1867.

[SEAL.] J. MILTON BONHAM, *Commissioner.*

58 Whereupon afterwards, to wit, on the fifth day of April, in the year aforesaid, before the honorable John Cadwalader, one of the judges of the said court, come, as well the within-named Thomas Nichols, as the within written The Farmers' Mutual Fire Insurance Company of Pennsylvania, by their attorneys within contained, and the jurors of the jury by the said marshal, for this purpose empanelled and returned, to wit: 1, James M. Leddy; 2, Morris R. Stroud;

3, George Plitt; 4, Patrick Ward; 5, Isaac Barton; 6, Henry Carter; 7, Lindley Smith; 8, George Whitney; 9, John Fagan; 10, Samuel B. Thomas; 11, Ephraim Hawes; 12, Bernard Quigley, being called, come, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises aforesaid, on their oaths and affirmations aforesaid, do say that they find for the plaintiff, the said Thomas Nichols, and assess the damages at four thousand two hundred dollars, with six cents costs.

59 And the said The Farmers' Mutual Fire Insurance Company, by their attorneys aforesaid, saith that the court here ought not to proceed to give judgment upon the said verdict, and pray that judgment against them, the said defendants, in and upon the verdict aforesaid, by the jurors aforesaid, given in the form aforesaid, may be stayed by reason that—

1. The verdict is against law, because the plaintiff proved no cause of action.

2. The verdict is against the evidence, because it shewed that the plaintiff had no interest in the subject, such as he had caused to insured.

3. The learned judge erred in his answers severally to the third and fourth points presented to him by defendant's counsel.

4. The judge erred in not charging the jury as requested by the defendants in the third and fourth points.

5. The judge erred in attaching to his affirmative answer to
60 the third and fourth points the following clause, viz: "Not that these propositions respectively were not applicable if the wooden building insured by the policy in question for one year only ending in October, 1866, was constructed by the plaintiff under the lease, which enabled him to remove it at pleasure, not only during that year, but afterwards, until the end of March, 1870." The court said that the plaintiff's ownership of a building thus removable by him was neither a lease-hold, nor, in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been during the term of insurance an absolute interest in a movable subject, and that if the jury so found upon the facts, and if there was no fraud, nor any misrepresentation, which in fact misled the defendants as to the character of the risk, the plaintiff is not in law precluded under these points from recovering.

61 And afterwards, to wit, on the seventeenth day of April, in the year aforesaid, come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen, and by the court here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court now here, that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid.

Therefore it is considered that the said Thomas Nichols do recover against the said The Farmers' Mutual Fire Insurance Company of Pennsylvania the said damages assessed by the said jury in form

aforesaid, as also his costs and charges aforesaid by the court here awarded to the said Thomas, with his assent, by way of
62 increase.

In the Supreme Court of the United States. Errors to the Circuit Court for the eastern district of Pennsylvania.

Assignment of errors.

THE FARMERS' MUTUAL FIRE INSURANCE Company, plaintiffs in error, and defendants below,
vs.
THOMAS NICHOLS, defendant in error and plaintiff below.

1. The court below erred in its answer to the third point presented by the counsel of the defendants below.

2. The court below erred in it answers to the fourth point presented by the counsel of the defendants below.

3. The court below erred in not charging the jury as requested by the counsel of the defendants below in the third and fourth points.

4. The court below erred in charging the jury in answer to the third and fourth points that "If the facts were so, the jury should find for the defendants; but that these propositions respect-
63 ively were not applicable, if the wooden building, insured by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during that year, but afterwards, until the end of March, 1870. The court said that the plaintiff's ownership of a building, thus removed by him, was neither a lease-hold, nor, in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been, during the term of insurance, an absolute interest in a moveable subject, and that if the jury so found upon the facts, and there was no fraud nor any misrepresentation, which in fact misled the defendants as to the character of the risk, the plaintiff is not, in law, precluded from recovering."

J. HILL MARTIN,
G. M. WHARTON,
For Pl'ffs in Error.

To Cl'k Supreme Court U. States.

64

65 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Benjamin Patton, certify the foregoing to be a true and faithful copy of the record and proceedings of the Circuit Court of the United States for the eastern district of Pennsylvania in the third circuit, in a certain plea of debt therein lately depending, wherein

Thomas Nichols was the plaintiff, and The Farmers' Mutual Fire Insurance Company of Pennsylvania were defendants.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at Philadelphia, this twenty-fifth day of October, A. D. 1867, and the ninety-second year of the independence of the said United States.

[SEAL.] BENJ'N PATTON,
Clerk C. C.

[5-ct. stamp.]

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the eastern district of Pennsylvania, greeting:

Whereas, in a certain suit in said Circuit Court between Thomas Nichols, plaintiff, *vs.* The Farmers' Mutual Insurance Company of Pennsylvania, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the acts of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the clerk of the Circuit Court has omitted to insert in the record the bill of exceptions that was duly allowed and certified."

You therefore are hereby commanded that, searching the records and proceedings in said cause, you certify what omission and errors you shall find to the said Supreme Court of the United States,
67 so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first day of December, A. D. 1867.

Issued 3rd January, 1868.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Endorsed: Supreme Court U. S. 1867. December term. No. 273. Farmers' Insurance Co., pl'ff in error, *vs.* Thomas Nichols. Writ of certiorari.

68 U. S. Circuit Court, E. D. of Penn'a, April Sess., 1867.

THOMAS NICHOLS, plaintiff in error,
vs.
THE FARMERS' MUTUAL FIRE INSURANCE Company, defendant in error. } No. 9.

I, Benjamin Patton, clerk of the Circuit Court of the United States for the eastern district of Pennsylvania, in obedience to the annexed writ of certiorari, issued in this cause by the Supreme Court of the

United States, to supply the omission in the record herein heretofore sent up to said Supreme Court as a return to the writ of error, which record so returned contains the pleadings, judgment, and record entire of said cause, excepting the bill of exceptions, do hereby certify that the following bill of exceptions was duly filed and allowed in said cause, which bill of exceptions, and further proceedings, is in the words and figures following, to wit:

Bill of exceptions.

Be it remembered that, at April sessions, A. D. 1866, (number 9,) came Thomas Nichols, a citizen of the State of New York, into the Circuit Court of the United States for the third circuit, and
69 impleaded the "Farmers' Mutual Fire Insurance Company" in a certain plea of debt, &c., in which the said Thomas Nichols, the plaintiff, declared, which declaration of the said plaintiff, filed the 22nd day of October, 1866, was in the words and figures following, to wit:

In the Circuit Court of the United States for the eastern district of Pennsylvania, of April Sessions, 1866.—No. 9.

Narr.

"The Farmers' Mutual Fire Insurance Company of Pennsylvania," citizens of Pensylvania, were summoned to answer Thomas Nichols, a citizen of New York, of a plea of debt; and thereupon the said plaintiff, by his attornies, complains:

For that whereas, heretofore, to wit, on the second day of October, 1865, by a certain deed, poll, or policy of insurance, then made and sealed with the seal of the said defendants, (and which said deed, poll, or policy, so sealed, the said plaintiff now brings here into
70 court, bearing date the day and year aforesaid,) after reciting that in consideration of one hundred dollars, (which then was paid by the said plaintiff to the said defendants,) it was by said deed, poll, or policy, then declared that said defendants did insure the said plaintiff against loss or damage by fire, to the amount of four thousand dollars, on a certain property as described in application and survey No. 17,676, and which was declared to be a part of the said policy, and a warranty on the part of the said assured, the said plaintiff, to wit, on his three storied wooden-roofed building, 26 × 50 ft., situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango county, Pennsylvania, and occupied as a hotel $3,000
On his household furniture therein 1,000

$4,000

And the said defendants, by said deed, poll, or policy of insurance, did promise and agree to make good unto the said plaintiff all such immediate loss or damage, not exceeding the amount insured, nor two-thirds the appraised value of building above the founda-
71 tion as should happen by fire to the property in said deed, poll, or policy of insurance, specified from the 9th day of October, 1865, (at 12 o'clock noon,) unto the 9th day of October, 1866, (at 12 o'clock noon,) the said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same should happen, and to be paid within three months after notice, proof, and adjustment thereof, in conformity to the conditions annexed to said deed, poll, or policy of insurance; and it was by said deed, poll, or policy of insurance declared that the said defendants shall not be liable to make good any loss or damage by fire which should happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and it was also thereby declared that said deed, poll, or policy of insurance was made and accepted in reference to the application and the conditions thereto annexed, as by the same reference thereto being had will more fully appear.

And the said plaintiff saith that at the time of the making of the said deed, poll, or policy of insurance, he was interested in the said insured premises and household furniture to a large amount,
72 to wit, to the amount of $10,000, and remained and continued so interested therein from the making of the deed, poll, or policy of insurance, until the loss and damage hereafter mentioned.

And the said plaintiff saith that the said premises and the household furniture therein, afterwards, to wit, on the first day of February, 1866, was burnt down and consumed and destroyed by fire, which did not happen by invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said plaintiff then sustained damage and loss to a large amount, to wit, to the amount of $3,000, so assured on the three-storied wooden-roofed building as aforesaid, and to the amount of $1,000, as assured on the household furniture therein as aforesaid.

And the said plaintiff saith that he did forthwith, after the loss and damage, to wit, on the 10th day of February, 1866, give notice to the said defendants, and did, as soon after as possible, to wit, on the 18th day of February, 1866, deliver a particular account of his loss and damage to the said defendants, and was ready and
73 willing to prove the same in such manner as the defendants should require.

And the said plaintiff saith that he did, at the end of three months thereafter, claim of and from the said defendants the amount of such loss or damage.

And the said plaintiff saith that although he has in all things conformed himself to, and observed all the things and stipulations which on his part were to be observed and performed according to the effect of said deed, poll, or policy of insurance, yet the said defendants, contrary to the force and effect of the said deed, poll, or policy

of insurance, have not paid said sum of $4,000, or any part thereof, but refuse so to do, to the damage of plaintiff $5,000, hence this suit.

DAVID W. SELLERS,
GEO. W. BIDDLE,
Atty's for Plaintiff.

Which said declaration was endorsed as follows: 9 April sess., 1866. Nichols vs Ins. Co. Circuit Court. Narr. David W. Sellers, Geo. W. Biddle, for plaintiff. The clerk is requested to enter a rule to plead sec. reg. Oct. 22, 1866. Filed October 22nd, 1866.

74 And the said defendants pleaded.

And the pleas of the said defendants, filed on the 14th day of November, A. D. 1866, were in the words and figures following, to wit:

Pleas.

U. S. Circuit Court, E. D. of Penn'a., April sessions, 1866.

THOMAS NICHOLS, a citizen of New York,
vs.
THE FARMERS' MUTUAL FIRE INSURANCE Company, of Pennsylvania. } No. 9.

And the said defendants come and defend the wrong and injury, &c., and crave oyer of the said policy of insurance, and the conditions thereon endorsed, and of the applications, interrogatories, and answers thereto made by the plaintiff, which oyer being granted, and the same being severally seen and read, are as follows, to wit:

75 Application of Thomas Nichols, of Franklin, in the county of Venango, State of Penn., for insurance against loss or damage by fire, by the Farmers' Mutual Fire Insurance Co. of Penn'a, in the sum of four thousand dollars, for the term of one year from the ninth day of October, 1865, at noon, on the property below specified, the value of the property being estimated by the applicant.

	Estimated value.	Insured value.	Rate per $100.
On.....	$	$	$
On his three-storied wooden-roofed building 26xby 30 feet, situate on the central part of lot No. 472 on the ground plan of the borough of Franklin, Venango county, Penn., and occupied as hotel.....	$5,000	$3,000	$2½
On his household furniture therein.....	$	$1,000	$27½
		$4,000	

Am't of premium note, $ 10-100; premium paid, $100; policy and survey, $.

The said applicant make the following statements; and give the following answers to interrogatories here put relative to the risk, as a warrantey on the part of the assured.

1. Of what materials is the building and roof constructed? If of brick, are the party walls entire, and do they run through to the roof, or above?

1. All wood and wooden roof.

2. In what town, district, and street is it situated, and by what number known?

2. As above stated.

3. State the distance to other buildings. For what are the nearest buildings occupied, and of what materials are they built and roofed?

3. A frame hotel adjoins on the south, 8 feet E. to a frame store house; 18 ft. N. E. to a frame wash-house; 45 feet north to a frame stable; west and northwest are no exposures.

4. Are there any other exposures within 100 feet? If so state what they are, and how occupied.

4. No.

5. Are your stoves, chimneys, and apparatus for lighting and heating the building safely put up and provided with the usual preventives against accident by fire?

5. Yes.

6. Where are ashes kept?

6. Away from the buildings.

7. Give size of buildings, and number of stories?

7. 26x50 ft.; 3 stories high.

8. How or for what purposes are the buildings occupied?

8. As a public house or hotel.

9. If personal property, on which floor is it to be insured?

9. On all floors.

10. Is the property now insured? If so, at what office, for what amount, and at what rate?

10. No.

11. In whose name is the title of the premises?

11. My own.

12. Is it incumbered? If so, state the amount, and also the estimated value of the real estate covered by said incumbrance.

12. Yes; $1000 by mortgage, Jan'y, 1866.

13. Are all the facts material to the risk made known?

13. Yes.

No. 17.676.

And the undersigned applicant for the proposed insurance hereby covenants and agrees with this company, in case of loss to adjust the same in accordance with the by-laws of the company, and the conditions of the policy and application. But if any untrue answer has been given to the foregoing interrogatories, or if any change whatsoever be made in, upon, or around the property insured, so as to increase the hazard of the same, and the said assured shall fail or neg-

lect to give written notice of such change to said company and obtain their written consent to the continuance of the insurance, then this insurance to be void and the policy of no effect. It is also agreed that the company shall have the right, at any time to cancel this insurance by giving ten days notice of their intention to do so, and refunding the premium for the unexpired term of this insurance. And the said assured further agrees with this company to pay all such assessment or assessments (if any) as may from time to time be assessed against him, by the directors of said company, agreeably to the act of incorporation and the by-laws of the company, not, however, exceeding, in the aggregate, the sum of dollars and ten cents.

Dated October 5, 1865.

THOMAS NICHOLS, *Applicant.*
J. H. HILLIARD, *Agent.*

☞To whom is this policy to be sent?
To ag't ——— P. O., ——— county, State of ———.
☞Address of the applicant, Franklin P. O., Venango county, Pa.

76 The following questions must be answered fully and definitely by the agent, and when this is not done the application will be declined.

1. Has this company any other insurance in this building? If so, for whom, and what amount?

2. Has it any within 150 feet? If so, for whom, what amount, and how near? Also state how the intermediate space is occupied, and whether any brick walls intervene.

2. Do you consider it a desirable risk?

———— ————,
Agent.

If a manufacturing establishment, the applicant will give the following information in the body of the application, to wit:

What motive power is used? If steam, whether the boiler and flues are in the same building with the machinery, and how secured; whether a watchman is constantly kept in the building. Also, whether there is a force pump in the building with a good supply of water for putting out fires.

Give a ground plan of the buildings if exposed by others, and state of what materials the nearest buildings are constructed and roofed, and how occupied.

NORTH.

Endorsed: No. 17,676. Application of Thos. Nichols. Sum insured, $4,000. Approved by D. Strickler, Geo. D. Ebert, directors.

77 *No.* 17,676. $4,000.

The Farmers' Mutual Insurance Company of Pennsylvania.

By this policy of insurance, in consderation of one hundred dollars, and of the premium note of dollars, do insure Thomas Nichols, of

Franklin, in the county of Venango, and State of Penn'a, against loss or damage by fire, to the amount of four thousand dollars on the following property, as described in application and survey, No. 17,676, which is hereby declared to be part of this policy, and a warranty on the part of the assured, viz: on his three-storied wooden roofted building, 26 x 50 ft. situate on the central part of lot, No. 479 on the ground plan of the borough of Franklin, Venango Co. Pa., and occupied as a hotel $3,000
On his household furniture therein 1,000

$4,000

And the said company do hereby promise and agree, to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding the amount hereby insured, nor two-thirds the appraised value of any building above the foundation as shall happen by fire to the property as above specified, from the ninth day of October, one thousand eight hundred and sixty-five, at 12 o'clock at noon, unto the ninth day of October, one thousand eight hundred and sixty-six, at 12 o'clock at noon, the said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within three months after notice, proof, and adjustment thereof, in conformity to the conditions annexed to this policy; provided always, and it is hereby declared, that in case the assured shall already have any other insurance against loss by fire on the property hereby insured, not notified to this company, and mentioned in or endorsed upon this policy, then this insuarance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, and contains a just, full, and true exposition of all the facts and circumstances in regard to condition, situation, and the value of the property insured; and that if any fact or circumstance shall not have been fairly represented, or if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary, and have the same indorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall case and be of no effect. The assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property, without reference to the dates or validity of the different policies, or the solvency of the different companies insuring; and whenever this company shall pay any loss, the assured agrees to sign over all his right to recover satisfaction therefor from any other person or persons, town or other corporation, or to prosecute therefor, at the charge or for the account of the company, if requested.

This corporation shall not be liable to make good any loss or dam-

age by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

Privilege to keep gunpowder, camphene, fluid or pine oil for sale must be endorsed on this policy; and if steam be used in or about said premises and the boiler burst, or if any property hereby insured be struck by lightning or damaged by explosions from any cause whatever, this company shall not be liable unless fire ensues, and then for the loss by fire only.

And it is further declared, that this insurance is not intended to apply to, or cover any books of accounts, written securities, deeds, or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, spirituous liquors, paintings, patterns, plate, precious stones, printed music, prints, sculpture, statuary, and watches, are not deemed to be included in any insurance, unless particularly specified in writting in this policy.

And it is moreover agreed and declared, that this policy is made and excepted in reference to the application, also the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties hereto.

In witness whereof, the said Farmers' Mutual Fire Insurance Company, have caused these presents to be sealed with their seal, and signed by their president and secretary, at their office in York, Pennsylvania, the secend day of October, one thousand eight hundred and sixty-five.

H. KRABER, *President.*

D. STRICKLER, *Secretary.*

[stamp.]

Please read the conditions and examine the policy, and if not correct, return it immediately for alteration.

78 For value received, hereby transfer, assign, and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of .

Sealed and delivered in the presence of—

Approved.

[SEAL.] , *Secretary.*

For value received, hereby transfer, assign, and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of .

Sealed and delivered in the presence of—

Approved.

[SEAL.] , *Secretary.*

No. 17,676. Farmers' Mutual Fire Insurance Co., of Pennsylvania. Thos. Nichols. Franklin, Pa. Amount $4,000 insured. Premium note, $. Premium, $100 00. Expenses, $1 50. Expires Oct. 9th, 1866. Office east Main street, York, Pa. In communication with the office send the No. of your policy. Read your policy.

Conditions of Insurance.

1. Applications for insurance shall specify the construction and material of the buildings to be insured or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction or materials; whether any manufacturing is carried on within or about it; the applicant shall also state the true cash value of the property to be insured, and the incumbrance, if any, on the same; also the nature of the interest to be insured, if other than see simple title and ownership; also any other facts relating and material to the risk; and the said valuation, description, and survey shall be taken, and deemed to be the act of the insured, and a warranty on his, her, or their part, and said warranty shall apply to all the property insured, whether real or personal.

A false description of, or omission to make known in said application any fact or feature relating to the risk, which, if known, would induce the company to reject said application, or would in their estimation increase the hazard of the same; or an over valution of the property or interest to be insured, shall render absolutley void, any policy issued upon such description or valuation.

2. If, after insurance, either by the original policy or the renewal thereof, the risk shall be increased by any means whatsoever, or if the property shall be used or occupied so as to render the risk more hazardous than at the time of insuring, and the insured shall neglect or fail te pay such additional premium as the company shall determine, and obtain the written consent of the company to a continuance of the policy, such insuance shall be void and of no effect.

3. It shall be optional with the company to terminate the insurance, after notice given to the insured, or his representative, of their intention to do so, in which case the company shall refund the unearned portion of the premium.

Any building insured by this policy, becoming vacant or tenantless for a period of fifteen days, notice thereof must be immediately given to the secretary, and his consent obtained thereto in writing, otherwise this policy shall be void.

4. Property held in trust, or on commission, must be insured as such; otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the proofs of such loss, together with their respective interests therein. certified by them. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other interest, not fee simple absolute, it must be so stated in the policy, otherwise the same shall be void.

5. No insurance, whether original or continued, shall be considered as binding until the actual cash payment of the premium.

6. Policies of insurance, subscribed by this company, shall not be assignable in whole, or in part, without the written approval of the secretary, and the payment of fifty cents recording fees; and in case of any transfer of interest in this policy, or any part thereof, either by sale or otherwise, or if the property herein insured, or any part of it shall be transferred by any contract, or any change of partnership or ownership, whether prior or subsequent to any loss or damage to the property insured, without the written consent of the secretary, this policy shall thenceforth be void, and of no effect.

7. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured, to use their best endeavors for saving and preserving the property. And if they fail to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect; and it is mutually understood and agreed, that there can be no abandonment to the insurers of the subject insured; and also, that this company or their agent have the right to examine, and take account of the property saved, and that every facility be given to enable them to do so.

Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured, and the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

This company will not be liable for any loss or claim for stolen goods, or for any other property that may be stolen, nor for any loss that may happen through the gross, wanton, or wilful misconduct of the insured, or through his gross or culpable negligence, or by means of his intoxication.

8. No repairs or alterations in the premises shall be made after a fire, until notice is given to the company, and they have had an opportunity to view and examine.

9. In any case where the consent of this company is granted to a transfer of the policy as collateral security, then in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss in their own name as herein specified, and fully comply with all the conditions and requisitions as herein contained, as much so as if the policy had never been assigned, otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

10. Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company; and as soon after as possible, they shall deliver a true copy of the written part of their policy with the endorsements thereon, (if any,) and a particular account of their loss and damage, rendering to this company a schedule or list of articles destroyed or damaged, stating item by item, and article

by article, together with the actual cash value of each article or item, respectively, at the time of such loss, signed with their own hands, which said account shall set forth the whole cash value of the subject insured; the loss and damage claimed thereon; who are the owners thereof; if incumbered, stating how, and to what amount; that at the time of, and immediately before the fire, the subject insured was in, upon, or at the place or location specified in the written part of this policy, and covered thereby, and that the same was either destroyed or damaged, (as the case may be,) by fire; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any or what other insurances have been made on the same property, and giving a copy of the written portion of the policy of each company with the endorsements thereon; in what general manner, (as to the trade, manufactory, merchandise, or otherwise,) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when or how the fire originated, so far as they know or believe or have any information.

78 Where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind, and the estimated amount of damage which each article has sustained. The damage shall then be ascertained by the examination and appraisal of each article, by two disinterested appraisers, under oath, one chosen by the company, and one by the insured, and in case of their disagreement as to the amount of damage upon any article, they shall nominate a third person to act as umpire between them, whose detailed report in writing shall form a part of the preliminary proofs required to be furnished by the claimant; and if this company or their agent shall require such an examination or appraisement, it shall be so submitted, otherwise this company will not be liable for any loss or damage under this policy, and upon the neglect or refusal of the assured to nominate an appraiser and submit thereto, in accordance with the condition of this article of agreement, then all the claim or claims for loss or damage, by virtue of this policy, to cease, and to be of no force and effect.

And whenever required, the insured or person claiming, shall produce and exhibit the books of account, bills of purchase or duplicates thereof, and other vouchers, to the insurers or their specially authorized agent at the office of this company, or at the office of such agent, in support of the claim, and leave them with this company, a sufficient length of time to permit extracts and copies thereof to be made; and also, exhibit to any person or persons, named by this company, and permit to be examined by them, any property damaged on which any loss is claimed; and shall also, if required, submit to an examination under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of

anything relating to such loss or damage, and subscribe and make oath to such examination, the same being reduced to writing; and until such proofs, examinations, declarations, certificates, and exhibitions are produced, and permitted by the claimant, when required as above, the loss shall not be payable.

Any misrepresenation or concealment, fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this company under the within policy; and said company shall in no case, be deemed to have waived a full, literal, and strict compliance with, and performance of each and every of the terms, provisions, conditions, and stipulations in this policy contained and hereto annexed, to be performed and observed by and on the part of the insured, and every person claiming by, through, or under them, unless such waiver be express and manifested in writing under the signature of the secretary of said company; and no agent of this company shall have power to violate any of these conditions.

11. The estimated value of any building as given by the insured, and set forth in the application, shall not, in case of loss, be conclusive evidence of the real value of said building; but in case any dispute or difference arise touching such valuation, it shall, at the election of said company, be referred or submitted to the judgment of two impartial appraisers, of whom the company shall select one, and the said insured shall select a second; and the said two appraisers, in case of their disagreement upon the matter so submitted to them, shall nominate a third person to act as umpire between them, and the report, in writing, under the hands and seals of said appraisers, or any two of them, shall be binding and conclusive, as to the matter of valuation so submitted, upon both parties to this policy; and whenever the matter shall have been so submitted, as aforesaid, the insured shall not be entitled to recover more than two-thirds the amount of said appraisers' report or valuation; but such award shall not decide the liability of this company under this policy?

12. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within 30 days after having received the proofs of loss required by the conditions of this policy; and in case any dispute or difference shall arise or occur, touching any loss or damage under this policy, or the relative condition or value of said property, when rebuilt, repaired, or replaced, it may at the election of said company, be referred or submitted to the judgment of two impartial arbitrators, of whom the company shall select one, and the said insured shall select a second, and the said two arbitrators, in case of disagreement upon the matters so submitted or referred to them, shall nominate a third person to act as umpire between them, and the award in writing, under the hands and seals of such arbitrators, or any two of them, shall be binding and conclusive as to the matter so submitted, upon both parties to this policy, and in case the

said company shall require such submission to arbitration, the said difference or dispute, shall be so submitted but not otherwise.

13. Payment of losses shall be made at the end of three months after the loss shall have been ascertained, proved, and adjusted, as required by these conditions.

14. It is furthermore hereby expressly provided, that no suit or action of any kind against the company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after the cause of action shall have accrued, and in case any such suit or action shall be commenced against said company, after the expiration of six months next after the cause of action shall have accrued, the lapse of time shall be taken, and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

15. The company will not be answearable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimneys, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist, or for any damage caused by fire originating from depositing ashes or embers in wooden vessels.

16. The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity, and should there, during the life of this policy, an encumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void.

79 Whereupon the said defendants plead "non est factum."

And for a further plea in this behalf the said defendants plead payment with leave, &c.

And for a further plea in this behalf the defendants, by leave, &c., say that at the time of making the said application in the said declaration mentioned, the said plaintiff made, among other things, the following statement in an answer to one of the interrogatories then and there propounded by the defendants to him, to wit: "In whose name is the title of the premises?" (meaning thereby the said building then and there sought to be insured,) viz: that the said title was in his, the said plaintiff's own name, which said statement and answer the said defendants aver was then and there untrue and false; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

80 And for a further plea in this behalf the said defendants say that the interest of the said plaintiff in said building sought to be insured, as aforesaid, was not, at the time of making the said application and the said policy, a fee simple absolute, but, on the contrary, was a lease-hold, and that the interest of the said plain-

tiff was not so stated in the said policiy; and this the said defendants are ready to verify; wherefore, they pray judgment, &c.

J. HILL MARTIN,
G. M. WHARTON,
For Def'ts.

Which said pleas were endorsed as follows: 9. U. S. C. C., April, 1866. Nichols *vs.* Farmers' Mutual Fire Insurance Co. Pleas filed 14 November, 1866. J. Hill Martin, 217 So. 3d, 1867.

81 And thereupon, afterwards, to wit, on the 7th day o, December, A. D. 1866, the plaintiff's replication to said pleas was filed in the words and figures following, to wit:

Circuit Court, April Sess., 1866.

Replication.

NICHOLS *v.* INS. CO. } No. 9.

1. And plaintiff to the first plea by defendants pleaded, wherein they put themselves upon the country, doth the like.

2. And plaintiff to the second pleas replies non solvit; and this he prays may be inquired of by the country.

3. And to the third plea plaintiff saith that at the time of making said application, the said title in the said building then and there sought to be insured was in the said plaintiffs own name; and this he prays may be inquired of by the country.

82 4. And to the fourth plea plaintiff saith that his interest in said building insured by defendants at the time, when, &c., was an absolute interest, and not a lease-hold; and this he prays may be inquired of by the country.

DAVID W. SELLERS,
GEO. W. BIDDLE,
For Plaintiff.

Which said replication was endorsed as follows:

9. April sess., 1866. Circuit Court. Nichols *vs.* Ins. Co. Replication. Filed 7 December, 1866.

And thereupon, afterwards, to wit, on the 18th day December, A. D. 1866, the defandants filed their rejoinder, in the words and figures following, to wit:

83 U. S. Circuit Court, E. D. of Penn'a, April Sess., 1866.

Rejoinder.

THOMAS NICHOLS *vs.* FARMERS' MUTUAL FIRE INSURANCE CO. OF Penn'a. } No. 9.

And the said defendants, as to said replications of the said plain-

tiff by him thirdly and fourthly above pleaded, and whereby he hath put himself upon the country, do the like.

J. HILL MARTIN,
G. M. WHARTON,
For Def'ts.

And the said defendants at the same time, to wit, on the 18th day of December, A. D. 1866, pleaded and filed additional pleas, which said pleas were in the words and figures following, to wit:

Additinal pleas.

5. And for a further plea in this behalf the said defendants, by leave, &c., say that the interest of the said plaintiff in said building sought to be insured as aforesaid, was not, at the time of making the said application and the said policy, a fee-simple absolute, but
84 was another interest, which said other interest of the said plaintiff was not so stated in the said policy; and this the said defendants are ready to verify; wherefore, they pray judgment, &c.

6. And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of the said application and of making the said policy, the said building was used by the said plaintiff as a place for selling vinous and spiritous liquors without license therefor in due course of law; and this the defendants are ready to verify; wherefore, they pray judgment, &c.

7. And for a further plea in this behalf the said defendants, by leave, &c., say that after the making of the said policy the said plaintiff used the said building as a place for selling therein vinous and spirituous liquors, without license therefor in course of law, by means whereof the risk was changed so as to make it more hazardous than it was at the time of insuring; and the said plaintiff then
85 and there failed to give immediate written notice thereof to the secretary of the said defendants and obtain his written consent to the continuance of the said insurance; and this the defendants are ready to verify; wherefore, they pray judgment, &c.

8. And for a further plea in this behalf the said defendants, by leave, &c., say that the said plaintiff, after sustaining his said alleged loss or damage by fire, did not forthwith give notice thereof in writing to these defendants, and this they are ready to verify; wherefore they pray judgment, &c.

J. HILL MARTIN,
G. M. WHARTON,
For def't.

Which said rejoinder and additional pleas were endorsed as follows: "9. U. S. C. C. April, 1866. Thos. Nichols *vs.* Farmers' Mutual Fire Insurance Co. Rejoinder and additional pleas. Filed 18 December, 1866."

86 And thereupon, afterwards, to wit, on the 27th day of December, A. D. 1866, the plaintiff filed his replication to the 5th, 7th, and 8th, and his demurrer to [to] 6th plea of defendants, in the words and figures following, to wit:

Replication and demurrer.

NICHOLS
v.
INS. CO.

And plaintiff to the plea 5th pleaded comes and says, &c., that his interest in said building, insured by defendants at the time when, &c., was an absolute fee simple interest; and this he prays may be inquired by the country.

And plaintiff demurs to the plea 6th pleaded, and assigns for cause that the facts set forth in said plea are wholly immaterial, and do not traverse any averment of said declaration.

And plaintiff to the plea 7th pleaded comes and says, that
87 the risk of the defendants was not changed after the day of the date of the said deed, poll, or policy of insurance; and this he prays may be inquired by the country.

And plaintiff to the plea 8th pleaded comes and says, that after sustaining his loss, as in said declaration averred, he did give notice thereof in writing to said defendants; and this he prays may be inquired by the country.

DAVID W. SELLERS.
GEO. W. BIDDLE.

Which said replication and demurrer were endorsed as follows: 9. April sess., 1866. Nichols *v.* Ins. Co. Cir. Court. Replication to 5th, 7th, and 8th pleas, and demurrer to 6th. Filed 27th December, 1866.

88 And thereupon afterwards, to wit, on the 29th day of December, A. D. 1866, the said defendants pleaded and filed additional pleas, in the words and figures following, to wit:

U. S. Circuit Court E. D. of Penn., April Sessions, 1866.

Additional pleas.

THOMAS NICHOLS
v.
THE FARMERS' MUTUAL FIRE INSURANCE COMPANY. } No. 9.

9. And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of making the said application in the said declaration mentioned, the said plaintiff made, among other things, the following statements in an answer to one of the interrogatories then and there propounded to him by the defendants, to wit: "In whose name is the title of the premises? (meaning thereby the

said lot or piece of ground upon which the said building, then and there sought to be insured, was erected,) viz: that the said title was in his, the said plaintiff's own name, which said statement
89 and answer, the said defendants aver, was then and there untrue and false; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

10. And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of said application, and of making the said policy, the said building was, without the knowledge of the defendants, used by the said plaintiff as a house of ill-fame, by means whereof the hazard was increased, and that the said plaintiff then and there failed to give notice thereof to the said defendants; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

11. And for a further plea in this behalf the said defendants, by leave, &c., say, that after the making of the said policy, the said plaintiff used the said building for a house of ill-fame, by means whereof the risk was changed, so as to make it more hazardous than it was at the time of insuring, and that the said plaintiff then
90 and there failed to give immediate written notice thereof to the secretary of the said defendants, and obtain his written consent to the continuance of the said insurance; and this the said defendants are ready to verify; wherefore they pray judgment, &c.

J. HILL MARTIN,
G. M. WHARTON,
For d'f'ts.

Which said additional pleas were endorsed as follows: 9. U. S. C. C. April, 1866. Thos. Nichols *vs.* Farmers' Mutual Fire Ins. Co. Additional pleas. Filed 29 December, 1866. J. Hill Martin, att'y for d'f'ts.

91 And thereupon, afterwards, to wit, on the 2d day of January, A. D. 1867, the defendants filed a rejoinder and an amended 6th plea in the words and figures following, to wit:

U. S. C. C., E. D. of Penna, April Sessions, 1866.

Rejoinder and amended 6th plea.

THOMAS NICHOLS
vs.
THE FARMERS' MUTUAL FIRE Insurance Coiy. } No. 9.

And the said defendants, as to the replications of the said plaintiff by him, fiftly, seventhly, and eighthly, above pleaded, and whereby he hath put himself upon the country, do the like.

J. HILL MARTIN,
G. M. WHARTON,
Atty's for De'ft's.

Amended 6th plea.

And for a further plea in this behalf the said defendants, by leave, &c., say that at the time of the said application, and of making the said policy, the said building was, without the knowledge of
92 the defendants, used by the plaintiff as a place for selling vinous and spirituous liquors without license therefore in due course of law, by means whereof the hazard was increased, and the said plaintiff then and there failed to give notice thereof to the said defendants, and this the said defendants are ready to verify; wherefore they pray judgment, &c.

J. HILL MARTIN·
G. M. WHARTON,
Att'ys for Def'ts.

Which said rejoinder and amended 6th plea were endorsed as follows: No. 9. U. S. C. C., April, 1866. Thos. Nichols *vs.* Farmers' Mutual Fire Ins. Co. Rejoinder and amended 6th plea, 1867, January 2d.

93 And thereupon, afterwards, to wit, on the 4th day of January, A. D., 1867, to the 9th, 10th, and 11th pleas pleaded by the defendants, the plaintiff filed his replication in the words and figures following; to wit.

U. S. Circuit Court, April Sess. 66.

Replication to the 9th, 10th and 11th pleas.

NICHOLS *vs.* INS. CO. } 9.

And the plaintiff comes and says to the plea of the said defendants, 9thly pleaded, that the statement made by him in answer to the interrogatory referred to in said plea, was true, and this he prays may be inquired of by the country.

And the plaintiff comes and says to the plea of the said defendants, 10thly pleaded, that at the time of the said application, and of making the said policy, the said building was not used as a house of ill-fame, and this he prays may be inquired of by the country.

94 And the said plaintiff, to the plea of the said defendants, 11th pleaded, comes and says that after the making of the said policy he did not use the said building as a house of ill-fame; and this he prays may be inquired of by the country.

Jan. 4, '67.

DAVID W. SELLERS.
GEO. W. BIDDLE.

Which said replication was endorsed as follows: 9. April sess., 1866. Circuit Court. Nichols *vs.* Ins. Co. Replication to the 9th, 10th, and 11th pleas. Filed 4 January, 1867.

95 And thereupon, afterwards, to wit, on the 5th day of January, A. D. 1867, the defendants filed their rejoinder in the words and figures following, to wit:

U. S. C. C., E. D. of Penna., April, 1866.

Rejoinder.

THOMAS NICHOLS *vs.* FARMERS' MUTUAL FIRE INSURANCE Co. } No. 9.

And the said defendants, as to the said replication of the said plaintiff, by him ninthly, tenthly, and eleventhly, above pleaded, and whereby he hath put himself upon the country, do the like.

Jany 4th, 1867.

J. HILL MARTIN,
Att'y for Def'ts.

Which said rejoinder was endorsed as follows: No. 9. U. S. C. C. April, 1866. Thomas Nichols *vs.* Farmers' Mutual Fire Ins. Co. Rejoinder. Filed 5th January, 1867.

96 And thereupon, afterwards, to wit, on the 10th day of January, A. D. 1867, to the said amended 6th plea the plaintiff filed his replication and notice to produce papers in the words and figures following, to wit:

Circuit Court, April Sess. 1866.

Replication to amended 6th plea, and notice to produce papers.

NICHOLS *vs.* INS. Co. } 9.

Plaintiff replies to the plea 6thly pleaded by said defendants, and says that said building was not at the time of the said application, and of making the said policy used as a place for selling vinous and spirituous liquors without license therefor, and this, he prays, may be inquired of by the country.

DAVID W. SELLERS.
GEORGE. W. BIDDLE.

And defendants are here notified that at the trial of the above case they will be required to produce (1) the application and
97 survey No. 17,150, on which a policy of insurance was effected in the sum of $3,000 of the date of August 9, 1865.

(2.) The proofs submitted of the loss of the plaintiff by fire under the policy declared upon.

(3.) All of the letters which were sent by the plaintiff to the defendants after his loss.

Which said replication and notice to produce papers was endorsed as follows: Circuit Court, 9 April Sess., 1866. Replication to the amended 6th plea, and notice to defendants to produce papers. Nichols *v.* Ins. Co. Filed 10th January, 1867.

98 And thereupon, afterwards, to wit, on the 17th day of January, A. D. 1867, the defendants filed their rejoinder in the words and figures following, to wit:

U. S. C. C.—E. D., of Pa., April, 1866.

Rejoinder.

THOMAS NICHOLS
vs.
FARMER'S MUTUAL FIRE INSURANCE CO. } No. 9.

And the said defendants, as to the said replication of the said plaintiff by him sixthly above-pleaded, and whereby he hath put himself upon the country, do the like.

J. HILL MARTIN, *Att'y for Def't.*

Which said rejoinder was endorsed as follows: 9. U. S. C. C. April 1866. Nichols *vs.* Ins. Co. Filed 17 January, 1867.

99 And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Philadelphia before the Honorable John Cadwalader, one of the judges of the said court, on the 5th day of April, A. D. 1867, the aforesaid issue between the said parties came to be tried by a jury of the said circuit, for that purpose duly impanelled:

List of jurors.

1. James M. Leddy; 2. Morris R. Stroud; 3. George Plitt; 4. Patrick Ward; 5. Isaac Barton; 6. Henry Cater; 7. Lindley Smith; 8. George Whitney; 9. John Fagan; 10. Samuel B. Thomas; 11. Ephraim Hawes; 12. Bernard Quigley.

At which day came as well the plaintiff as the said defendants, by their respective attorneys. And the jurors of the jury aforesaid, impanelled to try the said issues being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issues, and upon the trial the counsel of the said plaintiff gave in evidence, and read to the jury the policy of insurance, a copy of which is hereunto annexed and marked A.

100 (Copy.)

No. 17,676. $4,000

Exhibit A.—The Farmers' Mutual Fire Insurance Company of Pennsylvania.

By this policy of insurance, in consideration of one hundred dollars, and of the premium note of dollars, do insure Thomas Nichols, of Franklin, in the county of Venango and State of Penn'a, against loss or damage by fire, to the amount of four thousand dollars, on the following property as described in application and survey No. 17,676, which is hereby declared to be part of this policy and a warranty on the part of the assured, viz: On his three storied wooden roofed building 26×50 feet, situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango Co., Pa., and occupied as a hotel $3,000
On his household furniture therein 1,000

$4,000

And the said company do hereby promise and agree to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding the amount hereby insured nor two thirds the appraised value of any building above the foundation, as shall happen by fire to the property as above specified, from the ninth day of October, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) unto the 9th day of October, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) the said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within three months after notice, proof and adjustment thereof, in conformity to the conditions annexed to this policy: Provided always, and it is hereby declared, that in case the assured shall already have any other insurance against loss by fire on the property hereby insured, not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, and contains a just, full and true exposition of all the facts and circumstances, in regard to condition, situation, and value of the property insured.

And that if any fact or circumstance shall not have been fairly represented; or if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease and be of no effect. The assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said

property, without reference to the dates or validity of the different policies, or the solvency of the different companies insuring; and whenever this company shall pay any loss, the assured agrees to sign over all his right to recover satisfaction therefor from any other person or persons, town or other corporations, or to prosecute therefor at the charge or for account of the company if requested.

This corporation shall not be liable to make good any loss or damage by fire which may happen by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power.

Privilege to keep gunpowder, camphene, fluid or pine oil for sale, must be endorsed on this policy; and if steam be used in or about said premises and the boiler burst, or if any property hereby insured be struck by lightning or damaged by explosions from any cause whatever, this company shall not be liable unless fire ensues, and then for the loss by fire only.

And it is further declared, that this insurance is not intended to apply to, or cover any books of account, written securities, deeds, or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, spirituous liquors, paintings, patterns, plate, precious stones, printed music, prints, sculptures, statuary and watches, are not deemed to be included in any insurance, unless particularly specified in writing in this policy.

And it is moreover agreed and declared, that this policy is made and excepted in reference to the application, also the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto.

In witness whereof, the said Farmers' Mutual Fire Insurance Company, have caused these presents to be sealed with their seal, and signed by their president and secretary, at their office, in York, Pennsylvania, the second day of October, one thousand eight hundred and sixty-five.

[SEAL.] (Signed) H. KRABER, *President.*
(Signed) D. STRICKLER, *Secretary.*

☞ Please read the conditions and examine the policy, and if not correct, return it immediately for alteration.

101 For value received, hereby transfer, assign and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of

Sealed and delivered in presence of—

Approved.

[SEAL.] , *Secretary.*

For value received hereby transfer, assign and set over unto and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of

Sealed and delivered in presence of—

Approved.

[SEAL.] , *Secretary.*

Endorsed: No. 17,676. Farmers' Mutual Fire Insurance Co. of Pennsylvania. Thos. Nichols, Franklin Pa. Amount $4,000 insured. Premium note, $; premium, $100 00; expenses, $1 50. Expires, Oct. 9th, 1866. Office, East Main street, York, Pa. In communicating with the office, send the No. of your policy. [Read your policy.]

Conditions of Insurance.

1. Applications for insurance shall specify the construction and material of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction or materials; whether any manufacturing is carried on within or about it; the applicant shall also state the true cash value of the property to be insured, and the incumbrance (if any) on the same; also the nature of the interest to be insured, if other than fee simple title and ownership; also any other facts relating and material to the risk. And the said valuation, description and survey shall be taken and deemed to be the act of the insured, and a warranty on his, her, or their part, and said warranty shall apply to all the property insured, whether real or personal.

A false description of, or omission, to make known in said application any fact or feature relating to the risk, which, if known, would induce the company to reject said application, or would in their estimation increase the hazard of the same; or an over-valuation of the property or interest to be insured, shall render absolutely void, any policy issued upon such description or valuation.

2. If, after insurance, either by the original policy or the renewal thereof, the risk shall be increased by any means whatsoever, or if the property shall be used or occupied so as to render the risk more hazardous than at the time of insuring, and the assured shall neglect or fail to pay such additional premium as the company shall determine, and obtain the written consent of the company to a continuance of the policy, such insurance shall be void, and of no effect.

3. It shall be optional with the company to terminate the insurance, after notice given to the insured, or his representative, of their intention to do so; in which case the company shall refund the unearned portion of the premium.

Any building insured by this policy, becoming vacant or tenantless for a period of fifteen days, notice thereof must be immediately

given to the secretary, and his consent obtained thereto in writing, otherwise this policy shall be void.

4. Property held in trust, or on commission, must be insured as such; otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the proofs of such loss, together with their respective interests therein, certified by them. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other interest, not fee simple absolute, it must be so stated in the policy, otherwise the same shall be void.

5. No insurance, whether original or continued, shall be considered as binding until the actual cash payment of the premium.

6. Policies of insurance, subscribed by this company, shall not be assignable in whole, or in part, without the written approval of the secretary, and the payment of fifty cents recording fees; and in case of any transfer of interest in this policy, or any part thereof, either by sale or otherwise; or if the property herein insured, or any part of it, shall be transferred by any contract, or any change of partnership or ownership, whether prior or subsequent to any loss or damage to the property insured, without the written consent of the secretary, this policy shall thenceforth be void, and of no effect.

7. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured, to use their best endeavors for saving and preserving the property. And if they fail to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood and agreed, that there can be no abandonment to the insurers of the subject insured; and also, that this company or their agent have the right to examine, and take account of the property saved, and that every facility be given to enable them to do so.

Where property insured by this company, is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

This company will not be liable for any loss or claim for stolen goods, or for any other property that may be stolen, nor for any loss that may happen through the gross, wanton or wilful misconduct of the insured, or through his gross or culpable negligence, or by means of his intoxication.

8. No repairs or alterations in the premises shall be made after a fire, until notice is given to the company, and they have had an opportunity to view and examine.

9. In any case where the consent of this company is granted to a transfer of the policy as collateral security, then in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss in their own name as herein specified, and fully comply with all the conditions and requisitions as herein contained, as much so, as if

the policy had never been assigned; otherwise this policy shall be void, and of no force or effect whatever, and all liability on the part of this company shall cease.

10. Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the company. And as soon after as possible, they shall deliver a true copy of the written part of their policy with the endorsements thereon (if any,) and a particular account of their loss and damage, rendering to this company a schedule or list of articles destroyed or damaged, stating item by item, and article by article, together with the actual cash value of each article or item, respectively, at the time of such loss, signed with their own hands, which said account shall set forth the whole cash value of the subject insured; the loss and damage claimed thereon; who are the owners thereof; if encumbered, stating how and to what amount; that at the time of, and immediately before the fire, the subject insured was in, upon, or at the place or location specified in the written part of this policy, and covered thereby, and that the same was either destroyed or damaged (as the case may be) by fire. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any or what other insurances have been made on the same property; and giving a copy of the written portion of the policy of each company with the endorsement thereon; in what general manner, (as to the trade, manufactory, merchandise or otherwise,) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when or how the fire originated, so far as they know or believe or have any information.

Where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind, and the estimated amount of damage which each article has sustained. The damage shall then be ascertained by the examination and appraisal of each article, by two disinterested appraisers, under oath, one chosen by the company, and one by the insured, and in case of their disagreement as to the amount of damage upon any article, they shall nominate a third person to act as umpire between them, whose detailed report in writing shall form a part of the preliminary proofs required to be furnished by the claimant; and if this company or their agent shall require such an examination or appraisement, it shall be so submitted, otherwise this company will not be liable for any loss or damage under this policy; and upon the neglect or refusal of the assured to nominate an appraiser and submit thereto, in accordance with the condition of this article of agreement, then all claim or claims for loss or damage, by virtue of this policy, to cease, and be of no force and effect.

And whenever required, the insured or person claiming shall produce and exhibit the books of account, bills of purchase or dupli-

cates thereof, and other vouchers, to the insurers or their specially authorized agent, at the office of this company, or at the office of such agent, in support of the claim, and leave them with this company a sufficient length of time to permit extracts and copies thereof to be made. And also exhibit to any person or persons named by this company, and permit to be examined by them, any property damaged on which any loss is claimed. And shall also, if required, submit to an examination under oath, by the agent or attorney of this company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, and subscribe and make oath to such examination, the same being reduced to writing. And until such proofs, examinations, declarations, certificates and exhibitions are produced and permitted by the claimant, when required as above, the loss shall not be payable.

Any misrepresentation or concealment, fraud or false swearing, shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this company under the within policy. And said company shall in no case be deemed to have waived a full, literal and strict compliance with and performance of each and every of of the terms, provisions, conditions and stipulations in this policy contained, and hereto annexed, to be performed and observed by and on the part of the insured, and every person claiming by, through or under them, unless such waiver be express, and manifested in writing, under the signature of the secretary of said company. And no agent of this company shall have power to violate any of these conditions.

11. The estimated value of any building as given by the insured and set forth in the application shall not, in case of loss, be conclusive evidence of the real value of said building. But in case any dispute or difference arise touching such valuation, it shall, at the election of said company, be referred or submitted to the judgment of two impartial appraisers, of whom the company shall select one, and the said insured shall select a second; and the said two appraisers, in case of their disagreement upon the matter so submitted to them, shall nominate a third person to act as umpire between them, and the report, in writing, under the hands and seals of said appraisers, or any two of them, shall be binding and conclusive, as to the matter of valuation so submitted, upon both parties to this policy; and whenever the matter shall have been so submitted, as aforesaid, the insured shall not be entitled to recover more than two-thirds the amount of said appraisers' report or valuation; but such award shall not decide the liability of this company under this policy.

12. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do, within 30 days after having received the proofs of loss required by the conditions of this policy. And in case any dispute or difference shall arise or occur, touching any loss or damage under this policy, or the relative condition or value of said

property, when rebuilt, repaired or replaced, it may at the election of said company, be referred or submitted to the judgment of two impartial arbitrators, of whom the company shall select one, and the said insured shall select a second; and the said two arbitrators, in case of disagreement upon the matters so submitted or referred to them, shall nominate a third person to act as umpire between them, and the award in writing, under the hands and seals of such arbitrators, or any two of them, shall be binding and conclusive as to the matter so submitted, upon both parties to this policy, and in case the said company shall require such submission to arbitration, the said difference or dispute, shall be so submitted but not otherwise.

13. Payment of losses shall be made at the end of three months after the loss shall have been ascertained, proved and adjusted, as required by these conditions.

14. It is furthermore hereby expressly provided, that no suit or action of any kind againt the company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of six months next after the cause of action shall have accrued, and in case any such suit or action shall be commenced against said company, after the expiration of six months next after the cause of action shall have accrued, the lapse of time shall be taken, and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

15. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimneys, or in consequence of neglect or deviations from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist, or for any damage caused by fire originating from depositing ashes or embers in wooden vessels.

16. The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity, and should there, during the life of this policy, an encumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void.

102 And the preliminary proofs of loss, dated Feb'y 15, 1866, a copy of which is also hereunto annexed, marked B.

103 *Exhibit B.*

STATE OF PENNSYLVANIA, *County of Venango, ss:*

On this 15th day of Feb'y, 1866, before me, a justice of peace in and for said county, duly commissioned and sworn, personally appeared Thomas Nichols, who, being duly qualified according to law, deposeth and saith: That by a partly written and partly printed memorandum he made application to the Farmers' Mutual Fire Insu-

rance Company of Pennsylvania, at York, Penn'a, for insurance upon the property specified in said application to the amount of four thousand dollars, for the term of one year from the ninth day of October, 1865, at twelve o'clock at noon; that he made correct and truthful answers to the interrogatories contained in said application; that he paid one hundred dollars premium, and gave in addition thereto a deposit note in the sum of ten cents; that in virtue of said application the said company issued their policy of insurance, numbered 17,676, which attached and covered said property from the time and for the term above specified, as follows, to wit:

On his three storied wooden roofed building, 26x50 ft., situate on the central part of lot 479, on the ground plan of the borough Franklin, Venango co., Penn'a, and occupied as a hotel	$3 000
On his household furniture therein	1 000
	$4 000

That on the first day of February, 1866, a fire occurred which destroyed said hotel building and the furniture therein, and by which the said assured sustained loss and damage to the amount of six thousand three hundred and twenty-nine 79-100 dollars, as appears by the annexed papers or schedules, which contain a just and true inventory and appraisement of the same.

104 And the said assured thereby gives the following answers to the interrogatories here put in relation to said loss:

1. Where did said fire originate?

*1. Somewhere in the back part of the building, under the first floor, back of the partition.

2. What was the cause or origin of the fire? If not known, give a full general opinion of the same.

2. Cannot tell the cause; he believes it to have been set on fire by incendiaries.

3. Who was the owner of the property insured?

3. Deponent owned the building insured and the furniture.

4. Was any other person or persons, either directly or indirectly, interested in said ownership?

4. There was not; there was no copartnership existing at the time of the insurance, nor at the time of the fire.

5. How was the building and the several parts thereof occupied at the time of the fire?

5. As a hotel, and for no other purpose.

6. Was it occupied for any other purpose?

6. No.

7. Has any change been made in or on your policy? If so, give a copy of the same.

7. No change.

8. Has any change been made in or around your premises to change

the character of the risk since the date of your insurance? If so, state the same.

8. No change since the insurance.

9. If loss is on buildings, state their value, exclusive of land, cellar and foundation.

9. Value or cost of the hotel building, including stone foundation, $4,723; cost of foundation, $319.

10. In whose name is the title for the property?

10. In Mrs. May's. Deponent had a lease from Mrs. May and heirs for the part occupied by the deponent for five years from April 1st, 1865.

11. Is it owned in fee simple or held on lease, or otherwise? If on lease, when does it expire?

11. Not in fee simple, but on lease as above, for the yearly rental of $1,800 per annum.

12. Was the property encumbered at the time of loss? If so, state the amount of the same, and the character thereof.

12. One thousand by mortgage on the building, and no other liens or execution. There is since the fire a judgment for $83 against him on a justice's docket.

13. Was it encumbered at the time of insurance? If so, state the amount and character thereof.

13. Yes, for same to ——— Walson; I think to him alone; am not certain.

14. Was there any other insurance on the same property? If so, state the amount and annex a copy of the entire written portion of each policy and the endorsements thereon, (if any.)

14. No other insurance on the building, nor on the furniture in said building.

15. If the loss is on personal property, state the amount of such loss; and annex a schedule giving the quantity and quality of each kind, and the actual sound value of each article, and the amount of damage sustained on same.

15. See schedule attached.

16. Was any property damaged by removal? If so, state the amount, and annex a separate schedule of same.

16. Nothing but the castors saved.

17. What was the whole sale cash value of your stock at the time of the fire?

17. Sixteen hundred and six dollars and seventy-nine cents, ($1,606 79.) See schedule.

18. Where or in what part of the buildings or premises was the personal property burnt?

18. In all parts of the building as insured, 26 ft. by 50 feet; three stories.

105 19. Was any part of your property saved? If so, state amount and annex a separate schedule of same.

19. None saved but the castors.

20. Have you used due efforts to save the property exposed or burnt?

20. Yes, done all we could. Deponent and family had retired for sleep when the fire occurred, i. e., between three and four o'clock a. m.

21. Have you forthwith caused the saved or damaged property to be put in as good order as circumstances would admit?

21. Yes.

22. To the best of your knowledge and belief, was any of the property whereon loss is claimed stolen? If so, state the amount, and makes separate schedule of the same.

22. Deponent does not know or believe any were stolen.

23. Do you know of any other matter or information concerning said loss which is not already given? If so, state the same.

23. Does not know of any other matter.

24. When were you last upon the premises previous to the fire?

24. Was there at the time.

* In giving your answers to the foregoing interrogatories, you will please number them to correspond with the numbers of said interrorics.

And the said assured further states that said loss was not caused by any gross, wanton or wilful act or misconduct of his, or by his gross or culpable negligence; that the foregoing statement, with papers and schedules annexed, contain a particular, just, and true account and appraisement of said loss; that no misrepresentations have been made whereby the said company may have been deceived, nor has any fact or information touching or concerning the same been suppressed, concealed, or withheld; but that he, by misfortune and without fraud or evil practice, sustained loss and damage to the aforesaid property to the aforesaid amount of ($6,329 79,) four thousand dollars of which said amount he demands of said company, in payment of said loss. And the said assured hereby agrees to furnish said company such further preliminary proofs, evidence, and satisfaction as the said company may require.

Witness my hand this 15th day of February, 1866.

THOS. NICHOLS.

[Int. rev. stamp, 5-cents.]

Sworn and subscribed before me this 15th day of February, 1866.

F. BUNCE, *J. P.*

In making your schedules of property burnt, damaged, stolen, &c., you will give the value of each article at a definite sum per yard, pound, bushel, or gallon, &c., as the case may require, in their proper columns, and the said schedules must be properly signed by the claimant.

106 *Schedule of property of* —— ————, *burnt or damaged by fire on the day of* , 18 .

Quantity.	Names of articles.	ACTUAL CASH VALUE BEFORE THE FIRE.		ACTUAL DAMAGE.	
		Particular.	Aggregate.	Par'lar.	Ag'gate.
	Cost of the building as insured, as built during summer of 1865				$4, 723
	Estimated value of the furniture, as insured, as per inventory hereto belonging attached				1,606 79

Endorsed: Preliminary proofs of loss of Thos. Nichols, of Franklin, Pa.

107 *List of furniture, &c., contained in three story wooden frame building insured, policy* No. 17,676 *of the Farmers Mutual Insurance Co., of Philadelphia, for* $1,000.

4 castors, $2 50 each; 3 saved	$10 00
1 do	1 50
5 doz. cups and saucers	7 50
3 do. soup plates	6 20
5 do. dinner do	10 00
4 do. breakfast plates	6 00
5 do. pie do	5 00
4 do. saucer do.	3 00
2 do. tumbler	2 50
12 vegetable dishes	3 00
2 large dishes, $1 75	3 50
1 small do.	50
3 table cloths, 13 yds. $1 50	19 50
4. doz. knives and forks, $5 00	20 00
3½ do. tea spoons, $1 00	3 50
4 table spoons, $1 25	5 00
1 knife box	2 00
2 large tables and tressels	24 00
3 small	26 00
1 large tray	1 00
3 small do.	1 50
2 lamps, $2 50; 1 saved	2 50
Bread pan	1 00
1 large box lock	2 00
1 desk	2 00
1 stove and pipe	20 00
Coal hod and fire irons	1 50
108 2 doz. chairs	24 00

1	tin pan	1 75
1	carving knife	1 75
1	bag salt	25

Kitchen and pantry:

1	stove and pipe	20 00
1	doz. pie plates, yellow	1 50
1	do. tin do.	1 50
2	tin dippers	1 25
3	boilers copper bottom	8 00
3	iron pots	1 50
2	tea kettles, 1 iron, 1 tin	2 50
2	skillets	2 50
2	broilers	3 00
1	griddle	1 00
2	tables	3 00
1	dresser	2 00
½	bbl. flour	×6 00
150	lbs. beef, 12 c	×18 00
20	lbs. mutton, 15 c	×3 00
50	do. pork, 15 c	×7 50
10	do. lard, 25 c	×2 50
1	tub pickle cabbage	×2 00
1	crock do. lily	×3 00
5	crocks	2 00
1	carving knife and fork	2 50
	White and yellow bowls	2 00
1	steel	75
1	butcher's knife	50
1	chopper	1 75
	1 meat saw	3 00
109	1 buck saw	+1 00
	1 hand saw	+1 00
	Hammer, nails and gimblet	2 00
	Tea and canister	2 00
	Over	$325 00
	Coffee, &c	50
	Salt and box	1 00
	Spice box and spices	3 00
	Chopping bowl and chopper	1 50
	Apple parer	1 00
	Cold slaw cutter	1 00
1	lather's hatchet and plane	2 00
1	set of measures	1 50
1	scale and weights	7 00
1	spring balance	1 75
3	tin pails	3 50
3	wooden pails, 75 c	2 25

9 barrels, 25 c.	2 25
Turnips	+6 00
Beets	+1 50
1 lamp	2 50
Coal hod and fire irons	2 00
1 tub	25
6 milk pitchers	2 50
	$368 00

2nd floor and 3rd floor:

Matting in hall	10 00
1 lamp and bracket	2 00
1 broom	75
42 pillows, $1 37	57 54
4 feather pillows, $3 00	12 00
110 23 bed covers, $4	92 00
46 pillows slips, 75 c	34 50
7 straw mattresses, $4 00	28 00
22 mattresses, $7 00	154 00
1 hair do.	18 00
2 feather beds	30 00
2 cebra blanket	21 00
23 chambers, 75 c	17 25
25 looking-glasses, $1 50	34 50
20 pitchers and bows, $2 00	40 00
2 caps	5 00
3 tin wash bowls, 75 c	2 25
75 yds. hemp carpet, 50 c	37 50
4 wash stands, $2 50	10 00
2 tables	6 00
30 chairs, $1 00	30 00
30 yds. in grain carpet, $1 00	30 00
1 set draws	7 00
4 window curtains, $1 50	6 00
4 do. shades, 25 c	1 00
16 double beadteads, $7 00	112 00
10 single do. $7 00	70 00
1 double do.	3 50
1 do. do.	11 00
54 sheets, $2 00	108 00
74 blankets, $3 00	222 00
4 stoves and pipe, $15 00	60 00
4 shovels and pokers	2 00
	$1,642 79

20 towels, 75 c	15 00
Amount of insurance	$1,000 00
Saved 3 castors, $2 50 each	
1 clock, $3 50	3 50
	$1,660 29
Amount of beef, flour, &c., not insured, as marked by a cross	53 50
	$1,656 79

111 Isaac H. Hillyer, sworn, who testified: I live in the town of Franklin, Venango county, Pennsylvania. I was the agent for the defendants at the time of this insurance. The policy was effected through me; the premium was paid to me and I accounted to the company. I received notice of the loss; there was a written notice given me by Nichols four or five days after the fire. I passed it on to the defendants. The president came on a couple of weeks after the fire with his forms, and got these proofs himself.

Cross-examined by defendants' counsel.

He says: I still do business for defendants, but not as much as I used to do for them. I notified Mr. Kraber, the president, and Mr. Strickler, the secretary of the company, of the losses; they had several losses; I notified them of all of them. Prior to this paper the preliminary proofs of loss dated February 15, 1866, (being exhibited to witness,) there was no proof given me by Nichols, as Mr. Kraber came on and took charge of the matter before the 15th of February.

I think there was no formal paper left with me, but a memo-
112 randum of the articles of loss; this paper is the first proof. It was about three weeks after the fire that the president came on and took charge of the matter.

(Plaintiff's counsel read preliminary proofs to the jury.)

Isaac H. Hillyer re-examined by plaintiff, says: The building insured was 50 or 60 feet long by 30 feet wide, three stories high, had about thirty rooms in it when I surveyed it, not counting the dining room. I was there during its erection, and had it insured with carpenter's risk, by this same company; it was erected in 1865, I believe at the time of the loss it was nearly a new building.

Cross-examined.

It was a wooden building; it was built in the rear of an existing building and connected with it; it was an addition to old building; it was 30 by 50 feet. I mean the new part.

A certain paper, dated February 1866, being shown to witness he says: I don't think I ever saw this paper before. I never compared this paper with another. I know that Mr. Nichols left me a notice of the fire a very few days after the fire; it was addressed to the Far-

mers' Mutual Fire Insurance Company. I think I gave a notification to the company; I enclosed all the notices I received to the defendants a few days after the fire.

113 Jacob Wireman, sworn: I have been a builder 18 years. I erected a hotel in Franklin in 1865; at that time the plaintiff was making an addition to his house. I am familiar with the building. I saw it every day; it was worth $5000 at least. I was in Franklin when the fire occurred; the destruction was total.

Cross-examined.

I am a Philadelphian. I am a contractor; a carpenter by trade.

Plaintiff's counsel then offered in evidence, and read lease of premises. Sarah Mayes to Walton & Barcus, dated March 9, 1865, for 5 years, and assigned by them to plaintiff March 16, 1865, a copy of which lease and assignment is hereto annexed marked C.

114 *Exhibit C.—Copy of lease between Sarah Mays and S. W. Walton and T. J. M. Barchus.*

Articles of agreement made this ninth day of March, in the year of our Lord 1865, between Sarah Mays, widow, of the borough of Franklin, Venango co., and State of Pennsylvania, party of the first part, and Samuel W. Walton, and T. J. M. Barchus, of the same place, parties to the second part, witnesseth: That the first party hath demised and let, and by these presents doth demise and let unto the parties of the second part a part of the lot of ground on which she now resides, including the dwelling house, and fronting thirty-six feet on Liberty st., and extending back therefrom eighty feet, being so much of lot No. 479 for the period of five years from the first day of April next, at which time possession is to be given with the free use and privilege of using water out of the well near the house but not on the demised premises.

In consideration whereof, the said parties of the second part agree to pay an annual rent of one thousand eight hundred dollars,
115 to be paid quarterly in advance, and a failure so to pay any quarter's rent, shall, if such failure continue twenty days after the time of payment should be made work, a forfeiture of this lease and all the rights hereby granted, provided that if the first party cannot be found in town to make the payment to them, a deposit in the Venango bank, to the credit of the first party, made by the second party,, of the amount due shall de deemed a good payment. It is agreed between the parties that should the house be burned without any default on the part of second parties, then this lease shall be at an end, or continue in force at the option of said parties of the second part.

It is further agreed that the parties of the second part shall have the privilege of erecting such buildings upon the demised premises as they may see proper to do, and removing the same therefrom at anytime during the continuance of the term if they cannot come to an agreement with first party to purchase same; it is also agreed that

the second parties have the privilege of changing the
116 interior arrangements of the house as they shall see proper, at their own expense; that first party pay the taxes assessed or to be assessed upon the premises during the continuance of this lease; the said parties of the second part agree to surrender the peaceable possession of the premises at the expiration of the term in good order and condition, reasonable wear and tare and fire excepted. It is understood that the lessor has a life estate in the premises leased, but that the ultimate fee simple is in the heirs-at-law of Jacob Mays, deceased, who are children of the lessor; and the said lessor agrees that she will procure the ratification of this lease by such of the heirs as are now of age, and have a guardian appointed for such as are minors, who shall also ratify the same, so that this lease shall be good whether she survives during its continuance or not; all of which is to be done within sixty days from this date.

Witness the hands and seals of the parties the day and year first written.

[SEAL.] SARAH MAYS.
SAMUEL W. WALTON,

117 [SEAL.] WM. MOORE,
Guardian for Sarah and Simon Mays.
[SEAL.] T. J. M. BACHUS.

Attest:
H. C. WILCOX.
JOHN H. SMILEY.

In consideration of one dollar to each of us in hand paid by Samuel W. Walton and T. J. M. Bachus, we hereby ratify and confirm the foregoing lease, and agree that the same shall be good and available, even should our mother, the lessor, not survive to the end of the term.

Witness our hands and seals the 9th day of March, A. D. 1865.
[SEAL.] N. MAYES.
[SEAL.] R. MAYES.
[SEAL.] A. MAYES.

Attest:
JOHN H. SMILEY.

[Int. rev. stamp, 50c., canc.]

The lease was assigned to Thos. Nichols, March 15th, 1868.

118 *Continuation of Exhibit C.—Assignment of lease.*

Know all men by these presents, that we, S. W. Walton and T. J. M. Barchus, by F. W. Walton, their attorney-in-fact, duly authorized, do, for a valuable consideration, as per agreement, dated March 15th, 1865, between said parties and Thomas Nichols, assign, trans-

fer and set over to the said Thomas Nichols, his heirs and assigns, the within lease and term of years; to have and to hold the same to the said Thomas Nichols subject to the terms of the within lease, and also subject to the covenants to said Thomas Nichols in said articles of agreement for the full term of said lease.

Witness our hands and seals this sixteenth day of March, A. D. 1865.

[SEAL.] S. W. WALTON.
[SEAL.] T. J. M. BARCHUS.
[SEAL.] F. W. WALTON,
Attorney-in-fact.

[$5 U. S stamp.]

Signed, sealed, and delivered in presence of us.

[50 cent int. rev. stamp.]

119 Thomas Vanderslice, sworn, says: I am a builder. I superintended the putting up of this building for Mr. Nichols. I superintended the erection until the, carpenter work was done, and until the plastering was done; it was worth, at the time it was finished, between $4,000 and $5,000—I mean the back building; the new structure. It was arranged for a hotel, and had 24 bed-rooms, a dining room, and two small ante rooms.

Plaintiff's counsel offered and read in evidence the license of the plaintiff from the United States, from May 1, 1865 to May 1, 1866, copy of which is annexed D.

120 *Exhibit D.—Copy of license.*

In force from May 1, 1865; expires May 1st, 1866.

No. 177.—*United States Internal Revenue License.*

To all whom it may concern:

This license is granted to Thos. Nichols, of the boro. of Franklin, in the county of Venango and State of Pa., to carry on the business or occupation of hotel at No. — street in the aforementioned place, he having paid the tax of ninety dollars therefor, conformably to the provisions of the excise laws of the United States.

This license to be in force until the first day of May, 1866, provided the holder thereof shall conform to the requirements of said laws, and such other law or laws as are now or may hereafter be in this behalf enacted.

Given under my hand and seal at Franklin this 2 day of June, A.D. 1865.

[SEAL.] P. McGOUGHT,
Collector of the 20 collection district in the State of Pa.

Also license from the State, a copy of which is annexed, marked E.

121 *Exhibit E.—State license.*

COMMONWEALTH OF PENNSYLVANIA,
Venango County. ss:

In the court of quarter sessions of the said county of Venango, before the honorable James Campbell, president, and Joshua Davis, and Robert Lamberton, associate judges, holding said court at April term, 1865.

Whereas Thomas Nichols, of the borough of Franklin, has applied for a license to keep a hotel, and upon the hearing of the same no cause being shown to the contrary, the said judges, upon due consideration, have granted the said application; and whereas, the said Thomas Nichols has filed a bond with sufficient sureties, approved by our said judges, and also the receipt of the treasurer of the said county for the sum of twenty-five dollars, being the amount of his license fee ascertained according to law: Now, therefore, let it be known that our said judges have granted, and do hereby grant, to the said Thomas Nichols license to keep a hotel at the place designated in his
122 petition, with the privilege of selling brewed, malt and spirituous liquors, for the period of one year from the 25 day of April, 1865, upon condition that the said Thomas Nichols comply with the provisions of the act of general assembly, approved the 31st day of March, A. D. 1856, entitled "An act to regulate the sale of intoxicating liquors," and not otherwise.

In testimony whereof, the said judges have caused the seal of said court to be affixed this 29th day of April, A. D. 1865.

By the Court:

[SEAL.] C. E. LYTLE, *Clerk.*

[50-ct stamp.]

And the books of plaintiff, showing the cost of the labor and the materials for the erection of the building insured, being a total of $4 489 20, and closed. And here it was admitted that the value of the household furniture destroyed by fire, exceeded the amount insured.

Defendant's counsel then offered in evidence a commission and interrogatories issued to Franklin, Venango county, Pa., and read the depositions of witnesses examined under the same, a copy of which is annexed, marked F.

123 In the Circuit Court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1866.

THOMAS NICHOLS, a citizen of New York, plaintiff,
vs.
THE FARMERS' MUTUAL FIRE INSURANCE Company of Pennsylvania, citizens of Pennsylvania, defendants. } No. 9.

The President of the United States to J. Milton Bonham, esquire, Franklin, Venango county, Pennsylvania.

Know ye, that in confidence of your prudence and integrity, we have given unto you, and by these presents do give unto you, full power and authority, in pursuance of a rule lately made in the Circuit Court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain action, debt therein depending, wherein the said Thomas Nichols is plaintiff, and the Farmers' Mutual Fire Insurance Company, of Pennsylvania, are defendants, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said defendants as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories, hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up, and under your seals, plainly and distinctly set, together with this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this thirteenth day of February, A. D. 1867, and in the 91st year of the independence of the said United States.

[L. S. OF THE COURT.]

W. GRIER HIBLER,
Pro. Clerk of Circuit Court.

The execution of this commission appears in a certain schedule hereunto annexed.

J. MILTON BONHAM,
Commissioner.

124 In the Crcuit Court of the United State for the eastern district of Pennsylvania for the third circuit.

THOMAS NICHOLS
vs.
THE FARMERS' MUTUAL FIRE INSURANCE Company of Pennsylvania. } U. S. Circuit Court for the eastern district of Pennsylvania, April session, 1866. No. 9.

The defendants enter a rule for a commission to be issued in the above case to Franklin, Venango county, Pennsylvania, to take the depositions of such witnesses as may be produced, sworn, and examined on behalf of the defendants, on fifteen days notice to the plaintiff. And defendants file the following interrogatories, to be pro-

pounded to the witnesses; and name, as commissioner on their behalf, J. Milton Bonham, esquire, consellor-at-law, Franklin, Venango county, Pennsylvania:

1. State your name, age, residence. and occupation, and
125 how long you have followed that occupation. Do you know the plaintiff? If aye, how long have you known him? Where did he reside when you knew him? What business did he follow, and where does he live now?

2. Do you remember the destruction by fire of the hotel or building occupied by the plaintiff, in the town of Franklin, Venango county, Pennsylvania, in January or February, 1866? If aye, state at what time the fire occurred, and the extent of the loss, total or otherwise, and the cause of the fire? What kind of a building was the property destroyed? Describe it fully.

3. State, if you know, when the building occupied by the plaintiff as aforesaid, was erected, and by whom? When did the plaintiff first occupy said building? What kind of a structure was on the premises previous to his occupation of the same? Who owned the said premises before the said plaintiff occupied the same? State
126 whether the said plaintiff was the owner in fee simple of the said premises, or upon what terms or conditions he occupied or had possession of the same? Give all your knowledge and information on this point. In whose name was the title of the said premises on the second day of October, 1865, on the fifth day of October, 1865, and on the first day of February, 1866?

4. What was the nature and character of the business carried on by the said plaintiff in the said building destroyed by fire during his occupancy thereof, and previous to its destruction? If you say he used it for a hotel, state whether vinous or spirituous liquors were sold therein on the second and fifth days of October, 1865, or at either of those times, or at any time or times prior thereto or thereafter, and before the destruction of the said building by fire?

5. What kind or character of house did the plaintiff keep
127 from the early summer of the year 1865, down to the time of its destruction by fire, or during every portion of said time? Was it an orderly and quiet, or a disorderly and noisy place of resort? What kind or description of persons, if any, frequented it? What was done in said house by those who frequented it? Was there attached to the house any sign or description of the character of this building? If so, what was it? State also what effect, if any, on the risk of insurance, beyond that of insuring a hotel, was produced by the kind of persons who frequented it, or by what was carried on in the building at any time between the early summer of 1865 and its destruction by fire?

5. Do you know any other matter or thing which may be of benefit to the defendants in the above case? If so, state the same fully as if you had been specially interregated therteto.

J. HILL MARTIN,
G. M. WHARTON,
For Def'ts.

128 U. S. Cir. C't, April Sess. 1866.

NICHOLS *vs.* INS. CO. } 9.

Plaintiff's cross-interrogatories, sur defendant's rule for a commission to Franklin, Venango county, Pennsylvania.

I. Do you know the nature of the interest of the said plaintiff in the building destroyed by fire?

II. Did you visit the house of plaintiff before it was destroyed by fire? If so, how frequently?

III. Are you a stockholder of the defendant corporation?

IV. Have you had any dealings with defendants? If so, of what kind?

Feb'y 12, '67.

DAVID W. SELLERS.
GEO. W. BIDDLE.

A true copy from the record.

W. GRIER HIBLER,
Pro. Clerk C. C. U. S.

129 Deposition of witnesses produced, sworn, and examined on the sixth day of March, A. D. 1867, at the office of J. Milton Bonham, in the borough of Franklin, county of Venango, and State of Pennsylvania, by virtue of a commission issuing from the Circuit Court of the United States for the eastern district of Pennsylvania, to J. Milton Bonham directed, for the examination of witnesses in a certain cause depending in said court, wherein Thomas Nichols, a citizen of New York, is plaintiff, and The Farmers' Mutual Fire Insurance Company of Pennsylvania, a citizen of Pennsylvania, is defendant:

John H. Smiley, of the borough of Franklin, county of Venango, and State of Pennsylvania, aged fifty-two years, or thereabouts, being produced, sworn, and examined on behalf of the defendant, deposes as follows:

1. To the first general interrogatory on the part of the defendant, he answers as follows: My name is John H. Smiley; my age is fifty-two years; my residence Franklin, Pennsylvania.

130 For two years past I have been the agent of the Jamestown and Franklin Railroad Company. Previous to that, for about three years, I was general real estate agent. As real estate agent I have had charge of the real estate of Mrs. Sarah M. Mayes, widow of Jacob Mayes, dec'd, for the past five years. I am acquainted with Thomas Nichols, the plaintiff. I have known him over two years. He resided in Franklin when I knew him. I think he was connected with the oil business, and kept hotel. I do not know where he lives now.

2. To the second interrogatory on the part of the defendant he answers as follows: I remember the destruction by fire of the building occupied by plaintiff; it occurred in February, 1866. I forgot the day, but it was from one to three o'clock in the morning. The loss was a total loss. I do not know the cause, but I believe
131 it was set on fire. The front building was two story frame building, thirty-six feet by twenty-four feet, erected about twelve or fifteen years ago. The building attached, or back building on the north of the front building, was a frame building, about eighteen or twenty feet by thirty feet, three stories high. This was also a frame building, erected some time in the year 1865. The back building was built very cheap and unsubstantial.

3. To the third interrogatory on the part of the defendant he answers as follows: The front part of the building, described in my preceding answer, was erected by Jacob Mayes twelve or fifteen years ago. The back building (three story) on the north of the front building was built by Nichols (the plaintiff) in the spring or summer of 1865. The plaintiff first occupied the premises on or about the first of April, 1865. The front building above described,
132 with a small kitchen and a stable on the back end of the lot, were on the premises at the time of his occupation of the same and previous thereto. The heirs of Jacob Mayes, deceased, owned the premises before the said plaintiff occupied the same and during the time he occupied the same. The plaintiff was never owner of the fee simple in said premises. Through myself, as agent, the plaintiff leased the premises from some parties who had leased from the heirs of Jacob Mayes, deceased. The lease was for five years from about the first of April, 1865, for the consideration of eighteen hundred dollars per annum, payable quarterly in advance. He was to deliver the property, at the termination of the lease, in as good order as he received it, usual wear and tear excepted. The title to the premises on the second day of October, 1865, was in the name of Jacob Mayes, and likewise on the fifth day of October,
133 1865, and on the first day of February, 1866.

4. To the fourth interrogatory on the part of the defendant he answers as follows: The building was occupied as a public house—as a tavern—and, by common reputation, as a house of prostitution. Liquors, vinous and spirituous, were sold on the premises by plaintiff all the time during his lease, or shortly after he occupied it up to the time of the fire.

5. To the fifth interrogatory on the part of the defendant he answers as follows: The character of the house was bad. It was disorderly and noisy. A lower order of persons frequented it. There were women kept there. The sign attached to the building was "New York Hotel." I know that the risk was greatly increased beyond an ordinary hotel risk by the character of the persons frequenting it.

134 6. To the sixth and last interrogatory on the part of the defendant he answers as follows: As the agent for the heirs of Jacob Mayes, deceased, I went to the plaintiff some time before

the fire to demand a surrender of the lease, on account of the bad character of the house which he kept, and on account of the disorderly persons who frequented it, male and female. He then promised me he would expel those bad characters from his house and keep a better house. On account of the character of the house, and on account of the complaint made by neighbors and citizens generally, and the fear of its being burned, we intended to eject him, in accordance with the terms of the lease. The building Nichols erected was worth from fifteen to eighteen hundred dollars at the time of the fire.

JOHN H. SMILEY.

Subscribed before me.

J. MILTON BONHAM, *Com'r.*

135 *Cross-int.*

1. To the first cross-interrogatory of plaintiff he answers as follows: I do.

2. To the second cross-interrogatory of plaintiff he answers as follows: I visited the house of plaintiff frequently to remonstrate with him, and see if I couldn't get him to keep a more orderly house. I suppose I went there, towards the last, about once a week.

3. To the third cross-interrogatory of plaintiff he answers as follows: No.

4. To the fourth cross-interrogatory of plaintiff he answers as follows: I never had any dealing with the defendant.

JOHN H. SMILEY.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

136 Robert Lamberton, of the borough of Franklin, county of Venango, and State of Pennsylvania, aged fifty-seven or thereabouts, being produced, sworn, and examined on behalf of the defendant, deposeth as follows:

1. To the first interrogatory on the part of the defendant he answers as follows: My name is Robert Lamberton; my age is fifty-seven; my residence is Franklin. I am a private banker, and am also one of the associate judges of the Court of Common Pleas of Venango county. I have been a banker about six years. I have been on the bench four years. I am acquainted with Thomas Nichols, the plaintiff; I knew him a few months previous to February, 1866. I was acquainted with him from four to six months previous to the fire in February. He kept that house or hotel in Franklin, I do not know where he lives now.

2. To the second interrogatory on the part of the defend-
137 ant he answers: I remember the fire which burned the building of the plaintiff. I think the fire occurred on the morning of the first of February. It was from one to three o'clock in the morning, or perhaps from twelve to two. It was a total loss. I do not know how the fire occurred; but the report was that it was set

on fire. When Mrs. Mayes leased the house (the property was owned by the heirs of Jacob Mayes) there was a good-sized and good frame dwelling house on it—two stories—with a little kitchen in the rear. After it was leased there was another building put up adjoining it; the latter building was erected during the time Nichols occupied the lease. I don't consider the back building as very substantial; it was built on stone pillars and wooden posts.

3. To the third interrogatory on the part of the defendant he answers as follows: The front building was erected a number of years ago—over six years to my knowledge. The rear build-
138 ing was erected while Nichols was occupying the premises as a hotel. The front building above described was on the premises when Nichols went on the premises. The Mayes heirs owned the property when Nichols leased. Nichols was not the owner in fee simple to my knowledge. I don't know the terms or conditions of the lease. I do not know in whose name the title was in October, 1865, or in February, 1866.

4. To the fourth interrogatory on the part of defendant he answers as follows: I think the building was used as a hotel or tavern. I have seen a bar and bottles in the front room as I passed by, but I can't say whether liquor was sold there or not.

5. To the fifth interrogatory on the part of defendant he answers as follows: The character of the house Nichols kept was bad. The house was disorderly and noisy. The reputation of many of the persons, especially the women who frequented the house, was
139 bad. I do not know whether there was a sign at the house or not. I think the risk would be greater than if the building was used as an orderly hotel.

6. To the sixth and last interrogatory on the part of the defendant he answers as follows: I do not think a building of the kind Nichols built on the lease was worth more than two thousand dollars at the time of the fire.

ROBERT LAMBERTON.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

Cross.

1. To the first cross-interrogatory of plaintiff he answers as follows: I do not. I knew he leased, but don't know the conditions of the lease.

2. To the second cross-interrogatory of plaintiff he answers as follows: I never visited the house whilst Nichols had it, but passed by frequently.

140 3. To the third cross-interrogatory, on the part of plaintiff, he answers: I am not a stockholder of the defendant corporation.

4. To the fourth and last cross-interrogatory of plaintiff he answers: I have been insured with the company defendant, and have had losses paid to me.

ROBERT LAMBERTON.

Subscribed before me. J. MILTON BONHAM, *Commissioner.*

Samuel Plumer, of the borough of Franklin, county of Venango, and State of Pennsylvania, aged thirty-six years or thereabouts, being produced, sworn, and examined on behalf of the defendant, deposeth as follows:

1. To the first interrogatory on the part of the defendant he answers as follows: My name is Samuel Plumer; my age is thirty-six; my residence is Franklin, Venango county, Pennsylvania. I am a lawyer by profession. I have been practising here for the past
141 six years. I am acquainted with the plaintiff; I knew him for six months previous to February, 1866. He resided in Franklin, and kept a hotel known as the "New York Hotel." I don't know his present residence.

2. To the second interrogatory on the part of the defendant he answers as follows: I remember the fire which burnt down the building occupied by plaintiff as a hotel. I think the fire was on the morning of the first of February, 1866. The loss was total. The building burned was a frame building.

3. To the third interrogatory on the part of the defendant he answers as follows: There was a front and back building joining each other at the time the fire occurred. The front building, two stories high, was built some years ago by Jacob Mayes. The back building, three stories high, was built by Nichols some time during
142 the [during the] year 1865. I don't know exactly when plaintiff first occupied the building, but it was some time in the year 1865. The two story front building, with a small kitchen attached, and a small stable on the rear end of the lot, were on the premises previous to and at the time of Nichols' occupation of the same. The heirs of Jacob Mayes, deceased, owned the premises previous to plaintiff's occupying the same, and still own the same. The plaintiff was not the owner of the fee in the premises. He was a lessee. I do not know the terms or conditions of his lease. The title to the premises on the first day of February, 1866, on the second day of October, 1865, and on the fifth day of October, 1865, was in the name of Jacob Mayes.

4. To the fourth interrogatory on the part of the defendant he answers as follows: Nichols was ostensibly keeping a house of
143 entertainment, and selling liquors, but it was generally reputed to be a house of prostitution. This house was between my residence and office, and I passed it five or six times a day. I have seen persons drinking there frequently. I saw a bar and bottles in the front room. All this whilst in the possession of Nichols and previous to the fire in February, 1865.

5. To the fifth interrogatory on the part of defendant he answers as follows: For three months previous to the fire plaintiff kept a very disorderly house; I think the worst house that was ever kept in our town. Generally those frequenting it were of the lower order of persons. There was a sign attached to the building which read "New York Hotel. "I think the risk was greatly increased over an ordinary and orderly hotel risk by the character of the house.
144 6. To the sixth interrogatory on the part of the defendant

he answers as follows: The building erected by Nichols was of a very temporary character. I think two thousand dollars was far more than it was worth at the time of the fire. About two months before the fire I saw Nichols and called him into my office, and told him that the public were very much incensed at the character of the house he was keeping, and advised him to desist from keeping bad women about his house or else the people would take it in hands.

SAM'L. PLUMER.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

Cross.

1. To the first interrogatory of plaintiff he answers as follows: I know he had a lease-hold estate, but I do not know the conditions of the lease. I know that Nichols erected a part of the building destroyed by fire, but whether the building was to remain there after the expiration of the lease or not I do not know.

145 2. To the second cross-interrogatory of plaintiff he answers as follows: I was in the house once whilst Nichols kept it, There was a fight going on in it, and I went to see what was the matter. I don't recollect that I ever went there at any other time.

3d. To the third cross-interrogatory of plaintiff he answers as follows: No.

4. To the fourth cross-interrogatory of plaintiff he answers as follows: No.

SAM'L. PLUMER.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

George Brigham, of the borough of Franklin, county of Venango, and State of Pennsylvania, aged forty-one years or thereabouts, being produced, sworn, and examined on behalf of the defendant, deposeth as follows:

1. To the first interrogatory on the part of the defendant de-

146 poseth as follows: My name is George Brigham; my age is forty-one; my residence Franklin, Pennsylvania. I am by occupation an oil dealer. I have been an oil dealer for sixth months; previous to that time I was in the mercantile business. I am acquainted with Thomas Nichols, the plaintiff. I have been acquainted with him for two years. He resided in Franklin when I knew him. He kept the New York Hotel in Frankin. I do not know where he lives now.

2. To the second interrogatory on the part of the defendant he answers as follows: I know of the fire that occurred on the morning of the first of February, 1866, at which the New York Hotel building was burned. The fire occurred, I think, about half-past two o'clock in the morning. The loss was total. I think the building

was set on fire. The fire started at the northwest corner of
147 the New York Hotel. The building destroyed was frame, a two-story building fronting on Liberty street, and a three-story frame building attached back. The back building was poorly built, a cheap building.

3. To the third interrogatory on the part of the defendant he answers as follows: There were two buildings together. The front building, a two-story frame building, was built by Jacob Mayes, deceased, some ten or twelve years ago, and the rear building, a three-story frame building, was built by Mr. Nichols some time in the year 1865. The property belonged to the heirs of Jacob Mayes, deceased, when the plaintiff came into possession. Nichols was not the owner of the fee of the premises at any time. Nichols had a lease which he bought from other parties, (whose names I forget,) which parties got it from the heirs of Mayes. The lease was for
148 five years at a yearly rental of eighteen hundred dollars, payable quarterly in advance, and if not paid within twenty days after due, and if not paid within that time, lessee to forfeit lease and all the buildings, &c., thereon. The title to the premises on the second day of October, 1865, on the fifth day of October, 1865, and on the first day of February, 1866, was in the name of Jacob Mayes and belonged to his heirs.

4. To the fourth interrogatory on the part of the defendant he answers as follows: Plaintiff kept a hotel and was selling spirituous liquors up to the time of the fire.

5. To the fifth interrogatory on the part of defendant he answers as follows: The house kept by plaintiff was of a very bad character. It was both disorderly and noisy. It was frequented by bad characters, drunkards and gamblers by reputation. There were women of bad repute kept there also. There was a sign attached to the building—"New York Hotel." The risk was much greater
149 than it would have been if the hotel had been respectable and orderly.

6. To the sixth and last interrogatory on the part of the defendant he answers as follows: Shortly before the fire I called on Mr. Nichols and called his attention to the character of his house and the feeling of the people against it. He promised me that he would drive the bad women away and put a stop to the gambling going on there, but he never did so.

G. W. BRIGHAM.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

Cross-in.

1. To the first cross-interrogatory by plaintiff witness answers as follows: The back building described by me above was put up by Nichols; but I think he was to leave it on the property at the expiration of the lease; the rest of the property he had a lease on for five years.

2. To the second cross-interrogatory by plaintiff witness
150 answers as follows: I visited the house of the plaintiff frequently, but never except on business.

3. To the third cross-interrogatory by plaintiff witness answers as follows: I am not.

4. To the fourth cross-interrogatory by plaintifff witness answers as follows: I never had.

G. W. BRIGHAM.

Subscribed before me.

J. MILTON BONHAM, *Commissioner.*

COMMONWEALTH OF PENNSYLVANIA,
County af Venango, ss:

I, J. Milton Bonham, at the borough of Franklin, county and State aforesaid, at my office in said borough, do hereby certify that the witnesses, John H. Smiley, Robert Lamberton, Samuel Plumer, and George Brigham, prior to the taking of the several depositions, by virtue of the commission hereto attached, on the sixth day of March, A. D. 1867, were by me duly sworn to testify the truth, the
151 whole truth, and nothing but the truth in relation to the matter in controversy, in the suit mentioned in the caption of these depositions and in the hereunto attached commission, so far as they respectively might be interrogated in relation thereto, and the said depositions were, on the said sixth day of March, A. D. 1867, in the said borough, county, and State, sworn to, taken, and reduced to writing by me, and signed by said witnesses in my presence.

Given under my hand and seal at my office, in Franklin, this sixth day of March, A. D. 1867.

[SEAL.] J. MILTON BONHAM,
Commissioner.

Also application of plaintiff, with the interrogatories to, and answers of, the plaintiff annexed to the same and a part thereof. (See Exhibit G.)

152 *Exhibit G.*

Application of Thomas Nichols, of Franklin, in the county of Venango, State of Penn., for insurance against loss or damage by fire, by the Farmers' Mutual Fire Insurance Co. of Penn'a, in the sum of four thousand dollars, for the term of one year from the ninth day of October, 1865, at noon, on the property below specified, the value of the property being estimated by the applicant.

	Estimated value.	Insured value.	Rate per $100.
On	$	$	$
On his three-storied wooden roofed building, 26x50 feet, situate on the central part of lot No. 479, on the ground plan of the borough of Franklin, Venango co., Penn., and occupied as hotel	$5,000	$3,000	$2½
On his household furniture therein	$	$1,000	
		$4,000	$2½

Am't of premium note, $ 10-100; premium paid, $100; policy and survey, $; tax, $.

The said applicant make the following statements, and give the following answers to interrogatories here put relative to the risk, as a warranty on the part of the assured.

1. Of what materials is the building and roof constructed? If of brick, are the party walls entire, and do they run through to the roof or above?

1. All wood and wooden roof.

2. In what town, district, and street is it situated, and by what number known?

2. As above stated.

3. State the distance to other buildings? for what are the nearest buildings occupied, and of what materials are they built and roofed?

3. A frame hotel adjoins on the south, 8 feet E., to a frame storehouse 18 N. E., to a frame wash-house, 45 feet north, to a frame stable; west and northwest are no exposures.

4. Are there any other exposures within 100 feet? If so, state what they are, and how occupied.

4. No.

5. Are your stoves, chimneys, and apparatus for lighting and heating the building safely put up, and provided with the usual preventives against accident by fire?

5. Yes.

6. Where are ashes kept?

6. Away from the buildings.
7. Give size of buildings, and number of stories.
7. 26x50 feet; 3 stories high.
8. How or for what purposes are the buildings occupied?
8. As a public house or hotel.
9. If personal property, on which floor is it to be insured?
9. On all floors.
10. Is the property now insured? If so, at what office, for what amount, and at what rate?
10. No.
11. In whose name is the title of the premises?
11. My own.
12. Is it incumbered? If so, state the amount, and also the estimated value of the real estate covered by said incumbrance.
12. Yes; $1,000, by mortgage, Jan'y, 1866.
13. Are all the facts material to the risk made known?
13. Yes.

No. 17,676.—And the undersigned applicant for the proposed insurance hereby covenants and agrees with this company, in case of loss, to adjust the same in accordance with the by-laws of the company, and the conditions of the policy and application. But if any untrue answer has been given to the foregoing interrogatories, or if any change whatsoever, be made in, upon, or around the property insured, so as to increase the hazard of the same, and the said assured shall fail or neglect to give written notice of such change to said company and obtain their written consent to the continuance of the insurance, then this insurance to be void and the policy of no effect. It is also agreed that the company shall have the right, at any time, to cancel this insurance by giving ten days notice of their intention to do so, and refunding the premium for the unexpired term of this insurance. And the said assured further agrees with this company to pay all such assessment or assessments (if any) as may from time to time be assessed against him, by the directors of said company, agreeably to the act of incorporation and the by-laws of the company, not, however, exceeding in the aggregate, the sum of dollars and ten cents.

Dated October 5, 1865.

THOMAS NICHOLS, *Applicant.*
J. H. HILLIARD, *Agent.*

☞To whom is this policy to be sent? P. O. county, State of .

☞ Address of the applicant, P. O. county, State of

153 The following questions must be answered fully and definitely by the agent, and when this is not done the application will be declined:

1. Has this company any other insurance in this building? If so, for whom and what amount?

2. Has it any within 150 feet? If so, for whom, what amount, and how near? Also state hew the intermediate space is occupied, and whether any brick walls intervene.

3. Do you consider it a desirable risk?

——— ———, *Agent.*

If a manufacturing establishment, the applicant will give the following information in the body of the application, to wit:

What motive power is used? If steam, whether the boiler and flues are in the same building with the machinery, and how secured, whether a watchman is constantly kept in the building. Also, whether there is a force pump in she building with a good supply of water for putting out fire.

Give a ground plan of the building if exposed by others, and state of what materials the nearest buildings are constructed and roofed, and how occupied.

NORTH.

Endorsed: No. 17,676. Application of Thos. Nichols. Sum insured, $4,000. Approved by D. Strickler, Geo. D. Ebert, directors.

154 And closed.

Plaintiff then called Isaac H. Hillyer, who said: I lived on the opposite side of the square; I passed the hotel frequently; there were crowds around of all kinds of people; it was during the oil speculation. There was nothing diferent from other hotels.

Thomas Vanderslice, recalled: I boarded and slept at Nichols's Hotel in 1865. The character of the house was not different from any other hotel. I lived there six months; from May till September, 1865.

Charles H. Siddell, affirmed: I was in Franklin in the year 1865. I went there in December, 1864, and left in October, 1865. I know Nichols's Hotel; I boarded there several months. It was not a house of ill-fame, to my knowledge; when I left the new part was not finished. I was there after the new portion was occupied.

155 The defendant's counsel thereupon requested the court to charge the jury as follows: (See Exhibit H.)

Exhibit H.

NICHOLS
vs.
THE INSURANCE COMPANY.

The judge is respectfully requested to charge—

1. If the jury believe from the evidence that the plaintiff kept the premises insured as a house of ill-fame at the time of the said application, and of making the said policy without the knowledge of the

defendants, by means whereof the hazard was increased, and then and there failed to give notice thereof to the defendants, then and in such case the jury should find for the defendants.

2. If the jury believe from the evidence that the plaintiff kept the premises insured as a house of ill-fame, at any time covered by the policy, by means of which the risk was changed, so as to make
156 it more hazardous than it was at the time of insuring, and that the said plaintiff then and there failed to give immediate written notice thereof to the secretary of the defendants and obtain his written consent to the continuance of the insurance, then they should find for the defendants.

3. If the jury believe, from the evidence, that the plaintiff, at the time of making the insurance, was not the owner in fee of the lot of ground on which the premises insured stood, but on the contrary, his only interest therein was that of a tenant under a lease; and if they further belive that he gave the answer on the application, as the answer to the eleventh printed interrogatory, to wit: "My own," then and in such case, the jury should find for the defendants.

4. If the jury believe, from the evidence, that the interest of the plaintiff in the building sought to be insured was not, at the
157 the time of making the application and the policy, a fee simple absolute, but on the contrary was another interest, and that such other interest was not so stated in the policy, then they should find for the defendants.

5. That unless the plaintiff, in accordance with the terms of the policy, forthwith, fter sustaining his alleged loss, gave notice thereof in writing to the defendants, and otherwise complied with the provisions of the policy touching preliminary proofs, he cannot recover; and in the absence of such evidence, the jury should find for the defendants.

6. That if the jury should find for the plaintiff, they should give as damages only the cash value either of the furniture destroyed by fire, or of the building erected by the plaintiff, and destroyed by fire, or both, as the case may be, and not damages beyond the said actual cash value aforesaid.

158 7. That the plaintiff can only recover to the extent of his insurable interest in the property destroyed by fire, which was, if the jury belive the evidence, the cash value of the erection made by him, and does not include the value of the building in the premises at the time he took the lease.

Which said exhibit H is endorsed as follows: No. 9. U. S. C. C. April, 1867. Nichols *vs.* Insurance Co. Def'ts request the judge to charge the jury. J. Hill Martin, att'y for def'ts.

159 Whereupon the learned judge charged the jury as follows:

"In answer to the defendants' 1st, 2nd, 5th, 6th, and 7th points, the court instructed the jury as requested.

"To each of the 3rd and 4th points the court answered, that if the facts were so, the jury should find for the defendant; but that

these propositions, respectively, were not applicable, if the wooden building insured by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during that year, but afterwards until the end of March, 1870.

The court said that the plaintiff's ownership of a building thus removable by him was neither a lease-hold, nor, in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been, during the term of insurance, an absolute interest in a moveable subject, and that if the jury so found upon the
160 facts, and there was no fraud, nor any misrepresentation, which in fact misled the defendants as to the character of the risk, the plaintiff is not, in law, precluded under these points from recovering.

And thereupon the counsel for the said defendants, as to the instructions of the learned judge, in answer to the said third and fourth points, did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record, the counsel for the said Farmers' Mutual Fire Insurance Company of Pennsylvania, defendants, did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill
161 of exceptions, pursuant to [to] the aforesaid statute in such case made and provided, this day , A. D. 1867, (protesting against the insertion in the bill of exceptions of testimony not relevant to the points to which the exceptions apply, and to the redundancy of the statement of the evidence upon these points.)

[SEAL.] JOHN CADWALADER.

Which said bill of exceptions was endorsed as follows: 9. U. S. C. C. April sessions, 1866. Thos. Nichols *vs.* Farmers' Mutual Fire Insurance Co. Bill of exceptions. J. Hill Martin, Geo. M. Wharton, att'ys for def'ts.

I agree to the bill of exceptions as within presented.
April 17, '67.

DAVID W. SELLERS,
For Pl'ff.

162 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Benjamin Patton, clerk of the Circuit Court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and complete transcript of the bill of exceptions taken in this cause, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this fourth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of these United States the ninety-second.

[SEAL.] BENJ. PATTON,
Clerk of C. C.

Supreme Court of the United States.

DECEMBER TERM, 1868.

THE FARMERS' MUTUAL FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

THOMAS NICHOLS,
Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

F. A. DICK,
Of Counsel,
WITH
J. HILL MARTIN.

J. L. Pearson, Printer, corner 9th and D streets.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

THE FARMERS' MUTUAL FIRE INSURANCE COMPANY, *Plaintiff in Error*,

vs.

THOMAS NICHOLS, *Defendant in Error*.

Statement of the Case.

This is an action on a policy of insurance, in mutual form, dated October 2, 1865, and running for one year, on a frame hotel in Franklin, Venango county, Pennsylvania, to the amount of $3,000, and the furniture therein for $1,000, which were destroyed by fire on first February, 1866. A cash premium of one hundred dollars was paid when the policy issued, and a premium note given for —— dollars ten cents. The policy (p. 32) is preceded by an application in form of questions and answers. The 11th question is: "In whose name is the title of the premises?"

Answer—"My own."

12th. "Is it incumbered? If so, state the amount, and also the estimated value of the real estate covered by said incumbrance."

Answer—"Yes; $1,000 by mortgage, January, 1866."

13th. "Are all the facts material to the risk made known?"

Answer—"Yes."

Following which is a statement that "if any untrue answer has been given to the foregoing interrogatories, then this insurance to be void, and the policy of no effect." In the body of the policy (p. 35) is this: "And the assured covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and the value of the property insured; and that if any fact or circumstance shall not have been fairly represented, * * then this policy shall be of no effect."

And, on p. 36, "it is moreover agreed and declared that this policy is made and accepted in reference to the application, and also the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties hereto."

Condition No. 1 says, that—

"Applications for insurance shall specify * * the true cash value of the property to be insured, and the incumbrance, if any, on the same; also the nature of the interest to be insured, if other than fee simple title and ownership; also, any other facts relating and material to the risk; and the said valuation, description, and survey shall be taken and deemed to be the act of the insured and a warranty on his part, and said warranty shall apply to all the property insured, whether real or personal. A false description of or omission to make known in said application any fact or feature relating to the risk, which, if known, would induce the company to reject said application, or would in their estimation increase the hazard of the same; or an over-valuation of the property or interest to be insured, shall render absolutely void any policy insured upon such description or valuation." * * * 4th. "Property held in trust, or on commission, must be insured as such. * * Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other in-

terest, not fee simple absolute, it must be so stated in the policy, otherwise the same shall be void."—(p. 37.) * *

16th. "The insurance under this policy shall cease at and from the time the property insured shall be levied upon or taken into possession under any proceeding in law or equity, and should there, during the life of this policy, an incumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and the neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void."—(p. 41.) And by clause in the body of the policy, the damage to be paid could not in any event exceed "two-thirds the appraised value of any building above the foundation."—(p. 35.)

Amongst other matters, the defendant pleaded that the plaintiff had falsely stated "the title of the premises" to be in his own name; also, had falsely stated the interest to be insured was a fee simple absolute when it was a leasehold.—(pp. 13, 14, 15, 41.) On the trial the plaintiff gave in evidence the policy set out.—(p. 48 to 56.) Next the preliminary statement of the loss—partly in form of question and answer, thus:

Question 3d—"Who was the owner of the property insured?"

Answer—"Deponent owned the building insured and the furniture." * * * * * *

10th—"In whose name is the title for the property?"

Answer—"In Mrs. May's. Deponent had a lease from Mrs. May and heirs for the part occupied by the deponent for five years from April 1, 1865."

11th—"Is it owned in fee simple or held on lease, or otherwise? If on lease, when does it expire?"

Answer—"Not in fee simple, but on lease as above, for the yearly rent of $1,800 per annum."

12th—"Was the property incumbered at the time of loss? If so, state the amount of the same, and the character thereof."

Answer—"One thousand by mortgage on the building, and no other liens." * * * * *

Plaintiff then read in evidence a lease from Sarah May to Walton and Barchus, dated ninth March, 1865, for the period of five years, for the yearly rent of $1,800, payable quarterly in advance, providing, * * * and a failure so to pay any quarter's rent shall, if such failure continue twenty days after the time of payment should be made, work a forfeiture of this lease, and all the rights hereby granted. * * * It is agreed between the parties that should the house be burned without any default on the part of the second parties, then this lease shall be at an end, or continue in force, at the option of said parties of the second part. It is further agreed, that the parties of the second part shall have the privilege of erecting such buildings upon the demised premises as they may see proper to do, and removing the same therefrom at any time during the continuance of the term, if they cannot come to an agreement with first party to purchase the same."—(p. 63.)

On sixteenth March, 1865, the lessees assign to the plaintiff this lease in these words: "Assign to said Thomas Nichols, his heirs and assigns, the within lease and term of years, to have and to hold the same to the said Nichols, subject to the terms of the within lease, and also subject to the covenants to said Nichols in said articles of agreement, for the full term of said lease."—(pp. 64, 65.) Plaintiff, by two witnesses, proved value of the building at from $4,000 to $5,000, and with some further immaterial evidence plaintiff closed.—(p. 66.)

Defendant's proof opens p. 66.

After proof as to value of the building, &c., he gave in evidence the plaintiff's application for insurance, which is fully set out.—(p. 77.) J. H. Smiley, witness for defendant, who was the agent for the railroad company, says he "believes the house was set on fire, (pp. 70, 131,) that the building was very cheap and unsubstantial. The building was occupied as a tavern, and by common repu-

tation as a house of prostitution. It was disorderly and noisy; a low order of persons frequented it; that as agent for the lessors he went to the plaintiff some time before the fire to demand a surrender of the lease on account of the bad character of the house, and of the disorderly persons who frequented it, male and female; the building was worth from $1,500 to $1,800 at the time of the fire."

R. Lamberton, Associate Justice of the Common Pleas Court, says "the character of the house was bad; it was disorderly and noisy; the reputation of many who frequented it, especially the women, was bad; and the report was that it was set on fire, and he thinks it worth not over $2,000."—(pp. 71, 72.) Samuel Plummer says "Nichols was ostensibly keeping a house of entertainment and selling liquors, but it was generally reputed to be a house of prostitution. The house was between my residence and office, and I passed it five or six times a day. For three months previous to the fire plaintiff kept a very disorderly house—I think the worst house that was ever kept in our town. About two months before the fire I saw Nichols, and called him into my office and told him that the public were very much incensed at the character of the house he was keeping. The building was of a very temporary character. I think two thousand dollars was far more than it was worth at the time of the fire." —(p. 74.)

George Brigham, an oil dealer, says: "I think the building was set on fire; it was poorly built; a cheap building; the house was of very bad character; disorderly and noisy; frequented by bad characters, drunkards and gamblers by reputation; there were women of bad repute kept there, too. Shortly before the fire I called on Mr. Nichols, and called his attention to the character of his house, and the feeling of the people against it. He promised me that he would drive the bad women away, and put a stop to the gambling going on there, but he never did."—(p. 75.)

It was shown by the evidence that the building was erected by plaintiff after assignment of the lease to him. —(p. 65.)

INSTRUCTIONS.

The defendant asked of the court the following instructions, which were refused:

3d. "If the jury believe from the evidence that the plaintiff, at the time of making the insurance, was not the owner in fee of the lot of ground on which the premises insured stood; but on the contrary, his only interest therein was that of a tenant under a lease, and if they further believe that he gave the answer on the application as the answer to the eleventh printed interrogatory, to-wit: My own, then, and in such case, the jury should find for the defendant."

4th. "If the jury believe from the evidence that the interest of the plaintiff in the building sought to be insured was not, at the time of making the application and the policy, a fee simple absolute, but, on the contrary, was another interest, and that such other interest was not so stated in the policy, then they should find for the defendants."

"In answer to these 3d and 4th instructions, the court answered that if the facts were so, the jury should find for the defendant; but that these propositions respectively were not applicable if the wooden building insured by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during that year but afterwards, until the end of March, 1870. That the plaintiff's ownership of a building thus removable by him was neither a leasehold, nor in a technical sense a fee, but might, relatively to the contract of insurance, be considered as having been during the term of insurance an absolute interest in a movable subject, and that if the jury so found upon the facts, and there was no fraud, nor any misrepresentation which in fact misled the defendants as to the character of the risk, the plaintiff is not in law precluded under these points from recovery."

Argument.

It is contended on the part of the plaintiff in error that no insurance was ever perfected on the building of the plaintiff, Nichols, in consequence of his failure to comply with the terms of the policy.

Not only was there no waiver of anything required to be done by the assured, but on the contrary it was agreed that "said company shall in no case be deemed to have waived a *full, literal, and strict* compliance with and performance of *each and every* of the terms, conditions * * * in this policy contained to be performed on the part of the insured."—(Cond. 10, p. 40.)

The question now to be considered by this court is, whether the assured made out a case below, which places him within the terms of the policy.

One of the conditions was that "if the interest in the property to be insured *be a leasehold* or other interest, *not fee simple absolute, it must be so stated in the policy.*"—(p. 37.)

Again, the application is made a part of the policy, and provides, that "if any untrue answer has been given to the foregoing interrogatories, the insurance shall be void." (p. 33.) One of these questions requires a statement of the nature of the title.

In the body of the policy it is said, "that the representation given in the application for this insurance is a *warranty* on the part of the assured." Questions as to the nature of the title, also, were put to the assured, and his statement written down in the application.

Has the assured stated his title "*in the policy*," according to the truth, within the meaning of the policy?

The policy provides *expressly* for the statement of two kinds of title; the one is "*a fee simple title*," and the other a title "*not fee simple.*" When the "nature of the interest" to be insured is "other than *fee simple*," it must be stated; that is, even if absolute, but not fee simple, it must be stated. And again, the same meaning is ex-

pressed thus: "If the interest in the property to be insured be a leasehold or other interest, not fee simple absolute, it must be so stated in the policy."

It is explicitly shown that the insurer intends in every instance to know precisely what risk he is taking.

Insurance is not an arbitrary proceeding, nor a matter of law, but a mere matter of contract. Many of the early policies were held by the courts to constitute a general contract of insurance, so that where no representation of the kind of title or interest the assured had was made, it was considered to be insured, such as it might turn out to be after a loss; and the insurer was held in such cases liable to pay in fire policies the full value of the building destroyed, irrespective of the value of the interest of the assured therein. It was so held in the following, among other cases:

Strong vs. Ins. Co., 10 Pick., 40.
Lawrent vs. Chatham F. Ins. Co., 1 Hall, 41.
Franklin Ins. Co. vs. Drake, 2 B. Monroe, 47, 50.
Ætna F. Ins. Co. vs. Tyler, 16 Wend., 385, 396.
See also, Angell on Fire Ins., secs. 58, 59, 65, 66, 67.
3 Kent Com., 376.

Strong vs. Ins. Co., 10 Pick., 40, holds, that where a person had mortgaged a house, and then his equity of redemption had been sold under execution, but the time to redeem it had not elapsed, that he could recover the full value of the building, without reference to the value of his own interest. The court say: "The value of the plaintiff's interest in the property insured is not material. If he had an insurable interest at the time the policy was effected and at the time of the loss, he is entitled to recover the whole amount of the damage to the property, not exceeding the sum insured. * * * If, in the opinion of the underwriters, it was important and material to the risk to ascertain the nature of the interest intended to be protected by the policy, it must be presumed

that they would have inserted in the application an interrogatory so as to elicit the proper information. There being no such interrogatory, * * the plaintiff had every reason to infer that the state of his title was not deemed material to the risk, and was not required by the underwriters to be ascertained."—(p. 44, 45.)

1 Hall, 41, at p. 50 and 56, the court say: "It is the true and actual value of the tenement itself, at the time, independently of its location, or the insecurity of the title or terms by which it is held, that the insurers agree to make good. * It is of *no importance* whether the tenement stands upon freehold or upon leasehold ground, or whether the lease is about expiring or has the full time to run, when the fire occurs, or is renewable or not. The condition of the policy is satisfied if the title and ownership are in the insured at the time of the insurance and of the loss."

2 B. Monroe, 47, 50:

"If the assured had an insurable interest at the time of the insurance, and also at the time of the loss, he has a right to recover the whole amount of damage to the property, not exceeding the sum insured, without regard to the value of the assured's interest in the property."

In the light of such decisions, it was of the first importance that mutual insurers should become acquainted with all the facts entering into the risk. The insurer intended always that the assured should bear a part of the risk, and so have a common interest with the insurer; otherwise he might be profited by the destruction of the property.

To make this certain the contract was framed with apt clauses. Where a building was the subject of insurance, not only the value of the building as a mechanical structure was material to the risk, but the extent of the interest of the insured was also a material point. A tenant, by the courtesy, has an insurable interest as great as the owner in fee (2 B. Monroe, 47, 50); yet the

underwriter may not be willing to insure him in the same amount or at the same premium. A mortgagee whose equity of redemption has been sold under execution, and who has the bare right to redeem from said sale, and is under no legal obligation to do so, may insure in the same amount that he could if he held by perfect, unincumbered title (10 Pick., 40); and yet the insurer might feel that such a risk was too great to take, or if he did, would require a commensurate premium. And so in case of a tenant under a lease; his real interest in the building may range from being equivalent to the ownership in fee, down to the point of no value at all. Such value depends upon the terms of the lease. Under one lease the tenant may be the absolute owner of the building; as where it authorizes him to remove at his pleasure, and subject to no condition; while, under another, the tenant may have a term of only a few years, be subject to the payment of a ground-rent as great as the whole property will rent for, and have the privilege of removing the buildings subject to the condition of the previous payment of the rent. Under each of these cases the buildings may be of the same value, and yet the value of the interest of the lessees at the opposite extremes. In such cases, it may be made the subject of contract that the underwriter shall judge for himself whether or not he will insure a lessee; and if so, have all the facts which increase or lessen the value of the buildings to the lessee fully disclosed, before any risk on the same shall be taken. The insurer and insured may, on the same facts, form a very different estimate as to the value of the lessee's interest; the lessee may hold his interest to be worth as much as the absolute ownership of the property would be; while the insurer, disposed to lean to the safe side, and believing that the ground-rent was excessive in proportion to the entire rent of the property; or considering the fact that the ground-rent is as much an incumbrance on the property as a mortgage of like amount, payable in

installments, would be; would regard the lessee's interest as too slight, or too hazardous to be a desirable risk. The case at bar is a striking illustration of this very point. The insured insists that it was a totally immaterial fact in relation to the risk, that his ownership of the building was subject to the claims of the lessors, who had a preferred claim to the extent of $1,800 a year out of the rents; and that it was a fact not touching the value of his ownership, that a failure to pay such rent worked a forfeiture of his interest; and that it was a matter of no concern to the insurer to know, that in case the house burned the lease was at an end, and; as a consequence, the obligation to pay rent would cease; so that in case the building should become idle and then should be burned, the owner of it would be a double gainer; his outlay for rent would cease, and he would have converted into money a property not only idle and unproductive, but which was actually a daily loss to him, for the ground-rent ran on if the building was idle, so long as it was not consumed by fire.

This is, however, only argumentative to show that their are strong practical reasons why underwriters should secure to themselves a knowledge of all facts which constitute the title of the assured.

But a more weighty reason than any of the above exists why such leasehold interest should have been spread upon the policy, and that is because it is the express condition of the policy.

The court below undertakes to set out the contract in a new light, and declares that during the life of the policy the subject of insurance was personal property held by an "absolute interest," and interprets the policy to be one insuring mere personal property.

Both of the propositions involved in the conclusion of the court are denied.

First. A policy will not be treated as insuring a house as other than real estate, unless such meaning be drawn

from something within the policy. This lease is outside of the policy, and for this purpose is to be laid out of view. The policy purports merely to insure the owner of real estate; a house being real estate as positively and purely as land, and with and in undeniable confirmation of this meaning, is the direct expression of the policy speaking of the subject of the insurance as real estate, a term that must have its usual significance attached to it. Thus—

"12th. Is it encumbered? If so, state the amount, and also the estimated value of the *real estate* covered by said incumbrance. (Answer.) Yes, $1,000 by mortgage."

Just above, the 9th question is: "If personal property, on which floor is it to be insured? (Answer.) On all floors." And he applies for $3,000 insurance, first, on his three-storied hotel, on lot 472, estimated to be of the value of $5,000, and for $1,000 insurance on his "household furniture therein." Thus, speaking of the two kinds of property, the one as personal and the other real. These clauses, and those hereinbefore pointed out applicable to title and value of the property, show that the insurer treated the property as real estate, if he acted upon the language contained in the policy.

Both the burden of proof and the evidence adduced are against the assured.

But, *secondly*, it is denied that the terms of the lease were intended to convert the house into personal property. On the contrary, the lessor had a large ownership in the house by means of his preferred claim for the regular payment of $1,800 a year; and so far from his having relinquished his right to the house, it was expressly stipulated in his favor, that the lessee's right therein could not be asserted except subject to the landlord's prior and preferred lien.

There was nothing, therefore, in the tenant at the time of the insurance and loss but a *future* right of removal.

It was the *lessor's covenant* alone that gave an insurable interest in the house to the lessee in addition to his interest in the rents, and *that* was the proper subject of insurance *under this policy* so long as the contingencies of the lease hung over the property.

The insured now produces a lease between himself and a third party, and claims that this writing makes the house different from what in law it would be but for its effect. But the insurer never was made a party to that writing. *As between the insured and the insurer*, the house does not become personal property under this undisclosed lease; and that was the very subject of inquiry when the contract was made, whether the insured was to be treated as the owner of real estate or personal property, and the relations were then settled by the policy; it contains the whole contract of the parties.

The nature of the plaintiff's interest is stated in Kutter vs. Smith, 2 Wallace, 491, where, under a lease of nearly similar character as this at bar, in which the lessee had the right of purchase, it was urged that this gave him an ownership of the house as distinct from the land, the court say: "But we cannot concede that the plaintiff or his assignor had at any time the legal title to the building as distinct from the lot. The well-settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure."

It is contended, too, that the provision in the lease, that the lessee "shall have the privilege of erecting such buildings upon the demised premises as they may see proper to do, and of removing the same therefrom," (p. 63,) does not extend to the assignee of the lessee, who is not named therein. This covenant related to a subject not *in esse*. The buildings were erected by the assignee of the lessee. Again, the lease shows that the covenant could not attach upon the reversion, for it states that the lessor had only a life estate, and it is ratified by an *infant* through her guardian.

1 Smith's Lead. Cases (p. 120) says: "A covenant is said to *run with land* when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land; and to *run with the reversion*, when either the liability to perform, or the right to take advantage of it, passes to the assignee of the reversion." *Id.* (p. 116) says, when the covenant extends to a thing *in esse* it is annexed to the land, and goes with it, and binds the assignee, though he be not named. But when the covenant extends to a thing not in being, as to a house to be newly built, it binds only the covenantor, and not the assignee.—(Spencer's Case.)

The above rule is stated also in 1 Washb. Real Property, (p. 330,) where many authorities are cited.

The defendant in error relied upon the case of Brolaskey, 35 Penna, 282; but the differences between that case and this are material.

There the court expressly declare that it is not a case of mutual insurance. 2d. There was no warranty by the assured. 3d. There were no questions put and answered by him as to his title; and 4th. Although he held under a lease, it does not appear that there were any conditions in the lease which qualified the insured's right of removal. The fact that the premium note in the case at bar is for a nominal amount does not affect it as a mutual policy. In mutual policies, where the entire premium is paid in cash, still the effect is given in full to them as mutual.—(Union Insurance Co. vs. Hoge, 21 How., 35; 3 Ohio N. S., 388; 1 Penna., 359.)

In this policy the second condition provided that in case of increase of risk an additional premium might be required; if that should be taken in shape of a premium note, then it would be material that the title of insured should be fee simple unincumbered; but as a member of a a mutual company, the assured covenanted with the other stockholders for a risk based on a particular title, and all of the clauses of the policy were mutually dependent on

each other, and on the truth of the case made out on its face.

In Hope Mutual Insurance Co. vs. Brolaskey, 35 Penna., 282, the court say: "If this were a case of mutual insurance, whereby the insured becomes a member of the company, and pledges his property to secure that of others, there would be some reason for holding it to mean that a house, insured as a house, is real estate, and we suppose that the clause out of which this controversy arises was intended for such a case.

"But this was a common insurance, and we must presume that it was taken in the ordinary way, and justice does not require us to strain the defendant's language in their policy for their benefit." The policy being void as to the house, is void entirely.

25 Barbour, 497.

2 Selden, 53.

11 Cushing, 280.

The following cases are cited in support of the instructions Nos. 3 and 4. The refusal to give which is complained of as error:

In Marshall vs. Columbian Mut. Ins. Co., 7 Foster, 157. The building was erected on land of another, under an agreement that the plaintiff, at any time within three years, paying a sum agreed for rent of the land, might remove the building, or have a deed of the land on paying a stipulated price; and at the time of destruction of the building he had paid two years' rent, but had acquired no title to it, and the three years had not expired when the building was destroyed (p. 159). The insurance was in a mutual company, and it was provided in the policy that "if the applicant for insurance has a less estate than a fee simple, the policy shall be void, unless the true title of the assured shall be declared in his application." The application was to insure so much on his building, and no further representation relative to his title to the building or the land where it stood was

made (p. 165). The defendant's position is, that if the plaintiff had stated the true situation of the property, it would either *not have insured at all*, or would have insured as "*personal property*," and at a higher rate of premium" (p. 165). "In this case it was incumbent on the plaintiff to have set forth truly the situation of the property, and that the land on which the building stood was not his. The defendants made the contract with the plaintiff, upon the condition, that if the title was less than a fee simple, he should disclose it and state what it was, otherwise the policy should be void," (p. 166). In addition to these considerations it was material to the company to be correctly informed in regard to the plaintiff's interest in the property, and its character, that they might fix the proposed premium to be paid for the risk. Personal property is not ordinarily insured at the same rates as real estate; and if the truth had been known, it might have caused the company to have charged a higher premium or rejected the application entirely (p. 167).

After this opinion was delivered it was suggested that as the plaintiff was a citizen of Maine, and the property was in Massachusetts, the company might not have any lien by the laws of Maine, as the charter was granted by the Legislature of New Hampshire, and the Court say, this consideration will not change its decision. "It was material and necessary for the company to be informed in regard to the character and situation of the property in fixing the premium, and also to know whether the plaintiff owned the land or not, that they might the better understand his circumstances and decide whether they would exact security for the payment of the deposit note; and by the 6th sec. of the by-laws, which is a part of the policy, it is expressly provided, that if the applicant has a less estate than a fee simple, it shall be truly disclosed, otherwise the policy shall be void. This provision alone, upon the facts disclosed, would seem to settle the case against the plaintiff. My impression is that the case of Leathers

vs. Farmers' Mut. Ins. Co., 4 Foster, 259, is decisive of the point."—(p. 169, 170.)

Birmingham vs. The Empire Insurance Co., 22 Barbour, 457, 1864.

The conditions in the policy were substantially like those at bar, and required that the application should state "the nature of the title, if less than fee simple." The plaintiff represented that he owned the property by virtue of an article of agreement with E. C. Chapin. By the Court: ** "There is no evidence that he represented that he owned the dwelling house as a *chattel*, not affixed to the soil. Upon this state of facts, I am of opinion that the contract of insurance related solely to the interest which the applicant had in the building as the vendee in possession of the soil on which it stood, under the subsisting executors' contract referred to, and that the court below properly overruled the plaintiff's offer to prove that the building in question was a chattel not affixed to the freehold, and that at the time of insurance he was the owner of it.

The statement in the application respecting the nature of the plaintiff's title was a warranty, and being untrue, the policy did not take effect.

The defendants did not insure the building as a chattel. The agreement of the parties precludes all inquiry as to whether the plaintiff had any other insurable interest than that warranted; or as to whether the thing warranted was material to the risk, (citing Burnett vs. Saratoga Ins. Co., 5 Hill, 188.)

The ruling may also be sustained, on the ground that as the insured was called upon by the insurers to communicate the nature of his interest in the property, he was bound to state it accurately and fully; especially in view of the condition above referred to, that any misstatement or concealment relative to any of the requirements in said condition should avoid the insurance."

Walroth vs. St. Lawrence Mut. Co., 10 Upper Canada, 525: 1853.

The application asked: "Occupied by applicant or tenant?"

Answer—"Tenant."
Question—"Title by deed, or how?"
Answer—"Deed."
Question—"Incumbered or not? If not, say no."
Answer—"No."

It appeared that plaintiff was assignee of J. P., who had a lease from M. at a yearly rent, with a *right of purchase* at a certain price, and that there was a mortgage from M. to H., including the property. Held that irrespective of the mortgage, that the plaintiff had misrepresented his title, and could not recover. By the court: * * "The answer, *tenant*, implies that some one was occupying under plaintiff as owner, not that he was himself a tenant for a term, subject to yearly rents, and subject to the payment of a sum of money in gross. It is impossible to say that these are not incumbrances, and on the plaintiff's own title. As a tenant for a term, there is the rent and right of entry, which directly affects his title as tenant. As an expectant purchaser, there is the whole purchase money due. So that, if there was no mortgage paramount to plaintiff's right in either character, and affecting this land, I should think him not entitled to recover."

(See also Mutual Ins. Co. vs. Mahon, 5 Call. Va.)

Kibbe vs. Hamilton Ins. Co., 11 Gray, 163, was on a policy with same kind of conditions as here. The plaintiff "was the owner of the building, but was not the owner of the land upon which it stood, and had no written lease of the land, but paid an annual rent therefor." —(p. 165.) It was argued that "the description given may be fairly held to apply to an interest in the building without any ownership of land, and the facts relied upon

by the plaintiffs are competent evidence for the purpose of giving it that application."—(p. 167.)

By the court: "The twelfth article of the defendant's by-laws provides that any policy shall be void unless the true title and interest of the assured be expressed in the application for insurance, and that property held by lease, or standing upon land so held, shall not be insured unless specially described as such in the application. When this policy was made Marsh held the tenements which are therein described under an oral lease as tenant at will. Yet, in his application, he did not specially describe them as so held, but merely stated them to be his property. The policy states that the defendants relied upon the lien given them by the law upon the interest of any person insured in any buildings covered by the policy, and the land under those buildings. But the defendant could not have any lien at all on the land, nor a lien of any value on the buildings."

Reynolds vs. State Mutual Ins. Co., 2 Grant Penna. Rep., 326: 1856.

The insured was in possession under written articles of agreement, and had paid part of the purchase money. Amongst other conditions the policy required the true title to be stated. The second condition says: "If the interest in the property be a leasehold, or other interest not absolute, it must be stated in the policy, otherwise the policy shall be void."

By the court: "The case of the plaintiff below had one fatal defect in it. He was not the owner of the property insured, and did not disclose the real situation of his title in the application. When the purchase money has been only partially paid, his interest or estate in the land goes no farther than the payment, and the insurer always has a right to know what it is."

Smith vs. Bowditch Mut. Ins. Co., 6 Cush., 448. Plaintiff insured the property as his, when in fact he had only a bond for a deed—the policy required disclosure of title

—while the court declared that the plaintiff had an insurable interest, yet it was not insured under this policy.

The same doctrine is repeated in Lowell vs. Ins. Co., 8 Cush., 127, and in Wilbur vs. Bowditch Ins. Co., 10 Cush., 446; 15 Shepley, 252.

Columbian Ins. Co. vs. Lawrence, 2 Pet., 25, 1829, was an action on a fire-policy on a mill which was insured as the property of the plaintiff. The proof showed, instead of an absolute legal estate, that the "insured held only one-half of one-third under a lease for three lives, subject to a rent of $266.66, renewable forever, and one-half of the other two-thirds as mortgagees, and the other half held under a contract which had not been complied with."—(p. 48.) It was contended for the defence—1st. That there was no insurable interest; and 2d. That it was not such an interest as is described in the original offer and in the policy, nor such as is averred in the declaration.—(p. 43.) The court, by Marshall, C. J., held: "1st. That the plaintiff had an insurable interest; and 2d. That the policy was void, because his interest was represented to be absolute, but, as disclosed in the proof, was leasehold, and subject to contingencies." "The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured. The offer describes the property as belonging to Lawrence and Poindexter, and states it afterwards to be their stone mill. It contains no qualifying terms which should lead the mind to suspect that their title was not complete and absolute. * * * * It may be true that a mill occupied by Lawrence and Poindexter, and held under a lease or an executory contract, would be generally spoken of by themselves and others as their mill. * * Fair dealing requires that he should state everything which might influence, and probably would influence the mind of the underwriter in favoring or declining the contract.

"A building held under a lease for years about to expire, might be generally spoken of as the building of the ten-

ant; but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition. Insurances against fire are made in the confidence that the assured will use all precautions to avoid the calamity insured against, which would be suggested by his interest.

"*The extent of this interest* must always influence the underwriter in taking or rejecting the risk, and in estimating the premium; * * and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss."

In the Pennsylvania Insurance Company vs. Gottsman, 48 Penna., 151, 1864, Chief Justice Woodward, for the court, says: "It seems to us quite unnecessary to go into the learning or the distinctions betwixt warranty and representations, because the policy in this instance stipulates expressly that it should be void and of no effect if the assured should neglect to disclose the amount and nature of all encumbrances, or fail to obtain the consent of the company to any incumbrance that should be executed upon the property during the life of the policy." The court, then show that the risk of the company increases with diminution of ownership by the insured, and that, as his interest ceases, he must therefore pay an increased premium for the insurance, and, as to the nature of this increased risk, says "it does not involve a question for the *jury* as to an increase of risk. The policy *assumes* that the risk is increased, and hence the necessity for an increase of premium; and this assumption, on which the contract is based, is justified by all experience, for incumbrances diminish the interest of the assured in the property. The company takes insurance at less than the value of the property, that the owner may have an interest in protecting and preserving it—may be, in effect, part insurer.

Philips, Beckel & Co. vs. Knox County Mut. Company, 20 Ohio, 174, 1852, was on a policy requiring correct statement of the title. The plaintiffs represented

themselves to be the owners, while the title was in the "Dayton Hydraulic Company," a company of which they were the sole stockholders. It was held a non-compliance with the terms of the policy, and void.

Davenport vs. New England Co., 6 Cush., 340, 1850, holds that a representation about title is material, irrespective of the lien on the property. "It was material to know who were interested in or had any title to the estate; but more particularly was it material for the defendants to know what interest the plaintiff himself had in the premises. * * * It is manifest that the defendants deemed this information material, and they put the direct question, and it was a proper and a practical question, and it was material that the plaintiff should answer it truly. The plaintiff having given an untrue answer, cannot now be heard to say it was immaterial."

Leathers vs. Farmers' Insurance Company, 4 Foster, 259, holds that, *according to the terms of the contract*, it was made material to disclose the nature of the title, and thus settled the question whether it would otherwise have been material or not.

In Illinois Mutual Ins. Co. vs. Marseilles Manufacturing Co., 1 Gilman, 236, it is held that a policy is void for incorrect statement as to title in the application, and that the insured becomes a member of the company, and is bound by truth or error of such statements.

See, also, Catron vs. Tennessee Ins. Co., 6 Humph. Tenn. R., 176.

In Patten vs. Insurance Co., 38 New Hamp., 338, the court hold that *where the title is such that another party has a large insurable interest in the premises, this seriously affects the value of the plaintiff's title.* * Whether the company might or not have a lien on the property for the security of the premium note, it was material to them to be correctly informed as to the existence of an incumbrance, in order to enable them to exercise a proper discretion in determining the rate of insurance, the amount to be in-

sured, and the security to be required for the payment of assessments upon the deposit note. It may readily be conceived that the company might have declined to insure so large an amount, if they had understood that there were mortgagees having *so large an insurable interest that they might, with propriety, also obtain insurance to an equal or greater amount.* * * We think it clear, where the title of the insured is made the subject of special inquiry by the insurers, the *matter becomes material.*"

See, also, Towne vs. Ins. Co., 7 Allen, 51; and Clark vs. Manufacturers' Ins. Co., 8 How., 235, 250.

Richardson vs. Maine Ins., Co., 46 Maine R., 394, 1858. There was a statement that there was no mortgage on the property, in answer to a question, and by the terms of the policy it was made void for such misstatement. It was urged that, as the policy was not mutual, this was immaterial, thus—"But it is insisted that the erroneous answer to the 7th interrogatory, in the application, is entirely immaterial in a stock company, which has no lien upon the real estate upon which the property insured is situated. In 6 Cush., 340, the court held that a similar representation was clearly material, irrespective of the lien, and the doctrine of this case is affirmed in 2 Gray, 334.

"Parties to all contracts in writing are supposed to have the intentions which are clearly manifested by the terms thereof. * In the case before us, the conditions make a part of the contract; a statement in the application, which is one of the conditions, is not true in fact, though no moral wrong is imputed to the plaintiff. The court cannot withdraw this statement from its consideration. The parties have made it essential, and, to disregard it would be the substitution of another contract for that made by the parties."

1 Phillips on Ins., paragraph 542, says: "A misrepresentation or concealment by one party of a fact specifically inquired of by the other, though not material, will have the same effect in exonerating the latter from the

contract, as if the fact had been material, since by making such inquiry he implies that he considers it to be so. It is particularly applicable to written answers to interrogatories referred to in the policy. The rule is so because a party in making a contract, has a right to the advantage of his own judgment of what is material, and if by making specific inquiries, he implies that he considers a fact to be so, the other party is bound by it as such."—(*Id.*, par., 539, 641.)

In Carpenter vs. Providence Ins. Co., 16 Pet., 495, in the policy it was provided, in case of other insurance on the property which was not mentioned in or endorsed on the policy, the insurance should be void and of no effect. An instruction was given, that failing to comply with this condition made the policy void, and the court, by Story, J., say: "We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with when there has been no such mention or endorsement as *it positively requires;* and without which it declares the policy shall henceforth be void and of no effect."

In Duncan vs. Sun Fire Ins. Co., 6 Wend., 494, the court say: "The stipulations in policies are express warranties; an express warranty is an agreement expressed in the policy, whereby the assured stipulates that certain facts relating to the risk are or shall be true. It is not requisite that the circumstance or act warranted should be material to the risk. A warranty in a policy of insurance is a condition or contingency, and unless that be performed there is no contract, per Lord Mansfield, 1 Taunt., 345, who was then speaking of a condition precedent."

In Jefferson Ins. Co. vs. Cotheal, 7 Wend., 72, 80, the court say that a warranty is "unequivocal evidence of a stipulation, the non-compliance with which is to have the effect of avoiding the contract."

In Fowler vs. Ætna Ins. Co., 7 Wend., 274, the court

say: "In case of a warranty, it is perfectly immaterial whether the misdescription is the result of fraud or mistake; no excuse can be received for the non-performance of it."

In Cooper vs. The Farmers' Mutual Ins. Co., 50 Penn. Rep., 299, a policy of the same form is construed. The court hold the parties to its literal meaning, in these words (p. 305): "The defendant undertook to insure on condition that the building was free from incumbrance. By the policy it was stipulated that the representations made in the application should be a warranty on the part of the assured, and that the application contained a just, full, and true exhibition of all the facts and circumstances in regard to the condition, situation, and value of the property. And it was further agreed that the policy was made and accepted in reference to the application, and to the conditions annexed to the policy, and made a part of it, to be used and resorted to in order to explain the rights and obligations of the parties. Among those conditions was one that the company shall, in no case, be deemed to have waived a full, literal, and strict compliance with and performance of each and every of the terms, provisions, conditions, and stipulations in the policy. * * Whatever, therefore, the plaintiff represented in his application, he is bound to make good before he can have any resort to the defendant upon the policy. And if the facts averred in the application were not truly stated, it cannot matter whether they were misstated through mistake or fraud, or whether they were at all material to the risk, for the defendant undertook to pay a loss only in the contingency that those facts were truly stated."

See, also, Mitchell vs. Lycoming Ins. Co., 51 Penn., 402, 1865.

The Susquehanna Ins. Co. vs. Perrine, 7 Watts and Serg., 348, 1844, was action on a mutual policy; the condition concerning the adjacent buildings was not complied with in the application.

The court, by Gibson, Chief Justice, decide against the insured on the principle that he, by the insurance, becomes a member of the company and conclusively bound by its regulations, thus: "A regulation established by a by-law is not obligatory on a stranger, * but the act of incorporation provides that a party insured shall, *ipso facto*, be a member of the company; and on no other plan could a mutual insurance company be constituted, the object of the members being to share each other's losses for the general weal, and not to bear the risk of losses for a premium. * * * The object was to have a disclosure of every material cause of danger; * * it is that which regulates the premium, and it is, therefore, important to be known. * There has been, then, a fatal want of compliance with the particular requisite of the conditions," &c.

In several of the cases above cited, the suits were on policies not in mutual form, and it was urged that, as the companies would have no lien on the title for unpaid premium notes, it was immaterial whether the title was as represented or not. But the court held that, however that might be, yet the stipulations must be complied with the same. Amongst the cases so holding, are—

Richardson vs. Maine Ins. Co., 46 Maine, 394.
Davenport vs. New England Co., 6 Cush., 340.
Catron vs. Tennessee Ins. Co., 6 Humph., 176.

F. A. DICK,
of Counsel for Plaintiff in Error.

Junuary, 1869.

IN THE SUPREME COURT

Of the United States.

No. 125.

THE FARMERS MUTUAL INSURANCE CO. OF PENNSYLVANIA,

Plaintiffs in Error,

v.

THOMAS NICHOLS, A CITIZEN OF THE STATE OF NEW YORK,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

DAVID W. SELLERS,
GEORGE W. BIDDLE,
Counsel for Defendant in Error.

In the Supreme Court of the United States.

Number 125.

THE FARMERS' MUTUAL INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff in Error,

vs.

THOMAS NICHOLS, a citizen of the State of New York, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error on the second day of October, 1865, insured "his three-storied wooden roofed building, situate in the borough of Franklin, Venango County, Pennsylvania, and occupied as a hotel," in the sum of $3,000 for one year.

On the 1st day of February, 1866, the premises were destroyed by fire and an immediate loss of upwards of $6,000 accrued to the insured.

The underwriters refusing to pay, suit was brought. No defence was alleged before or after suit against the claim for $1,000 "on the household furniture" insured.

The verdict in favor of the plaintiff established the integrity of his relations to the underwriters.

No question is before this Court as one of error except those which arise on the exceptions of the plaintiff in error "to the instructions of the learned Judge in answer to the third and fourth points," presented by their counsel.

These points were:

3. "If the jury believe from the evidence that the plaintiff, at the time of the making the insurance, was not the owner in fee of the lot of ground on which the premises insured stood, but on the contrary, his only interest therein was that of a tenant under a lease; and if they further believe that he gave the answer on the application as the answer to the eleventh interrogatory, to wit: 'My own,' then and in such case the jury should find for the defendants."

4. "If the jury believe, from the evidence, that the interest of the plaintiff in the building sought to be insured was not, at the time of the making the application and the policy, a fee simple absolute, but on the contrary was another interest, and that such interest was not so stated in the policy, then they should find for the defendants."

The instructions of the learned Judge in answer to each of these points were:

"That if the facts were so, the jury should find for the defendants: but that these propositions respectively were not applicable if the wooden building issued by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during the year, but afterwards until the end of March, 1870;" and, "That the plaintiff's ownership of a building thus removable by him was neither a leasehold, nor in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been during the term of insurance, an absolute interest in a movable subject, and that if the jury so found upon the facts and there was no fraud, nor any misrepresentation, which, in fact, misled the defendants as to the character of the risk, the plaintiff is not in law precluded under these points from recovery."

The points and the instructions will be elucidated by a statement of the facts.

It will be seen [p. 63 of Record] that the insured was the assignee of lessees, with "the privilege of erecting such buildings upon the demised premises as they may see proper to do, and removing the same therefrom at any time during the continuance of the term, if they cannot come to an agreement with the lessors to purchase the same." The term ended March, 1870.

The insured built at once, and it appeared that the agent of the underwriters, Mr. Hillyer, lived in Franklin, and was there during its erection, and had it insured with carpenter's risk. [p. 62.] The underwriters were required to produce at the trial the application and survey on which the carpenter's risk policy was issued. [p. 47.] This was not done. The agent stated that when that was issued the lease and assignment was shown him.

It will be seen that the insured sought to insure *his building*. [p. 4.] The policy is issued in the terms of the application. [p. 6.] The answers were drawn up by the agent of the underwriters, he knowing every thing, and the jury have found by their verdict under the instructions, "that there was no fraud, nor any misrepresentations, which, in fact, misled the insurers as to the character of the risk."

The statement in the answer to the interrogatories accompanying the application, [p. 5,] that the encumbrance was a mortgage of $1,000, is renewed in the preliminary proofs [p. 57] that the same was on the building.

On this state of facts we are called upon to inquire if there was any error at law in the instructions of the learned Judge.

It must be remembered—

I. That the underwriters are a corporation chartered by the State of Pennsylvania.

II. That the policy was made and issued in that State.

III. That the *building insured* was in that State.

It may be therefore affirmed that the liabilities of each of these parties were enforceable according to the law of that State. This law was that of the contract.

It had been established in that State at the time of the trial.

(*a*) *That a house built by one without an estate in land having a right to remove it, created an absolute interest in a moveable subject as a fixture.*

(*b*) *That with such an interest on a like policy, with like conditions, the insured was entitled to recover, although he had made no disclosure as to the interest in the land.*

And the instructions of the learned Judge were directly within the line of the adjudications of the highest court in that State.

On the first point the Court is referred to *Coleman* v. *Lewis*, 27 Penna. State Reports, 291. [1865.] In this case, a brother who was the owner of the ground, agreed with his sister to build her a frame house on the ground, "she to pay for the cost of erection, to live in it as long as she pleased, and if she saw fit, or her brother sold the lot, or it was sold from him, she was to have the right to remove the house."

After the house was built the premises were sold under a common law execution, issued on a judgment against the brother.

After the sheriff acknowledged the deed, the sister removed the house, and the vendee brought an action for the value thereof. The County Court held "that the house was a fixture and subject to the lien on the judgment, and that the vendee took title thereto."

The Supreme Court reversed the County Court, and held that the agreement of removal created an *absolute property* in the sister.

On the second point the Court is referred to *Mutual Insurance Company* v. *Brolaskey*, 35 Penna. State Rep., 281. [1860.] In this case the insured was a tenant "with privileges of removing the buildings erected by him if the lessor did not take them at an appraisement."

The tenent erected a three storied frame building, and insured without disclosing the nature of his interest in the demised premises.

The policy contained a condition that "if the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing or otherwise, the insurance shall be void."

The building was destroyed by fire and the judgment went against the underwriters, the Court holding that in this case the building was personal property, and that the interest of the insured therein was absolute.

It may be seen from this last case that the learned Judge, as a matter of law, could have peremptorily instructed the jury to find for the insured, but he qualified his instructions in every particular, which honest underwriters could claim when he added that the plaintiff could only recover "if there was no fraud, nor any misrepresentation, which in fact misled the defendants as to the character of the risk."

This brief is closed with a chronological history of the events:

1865.	March	9.	Lease of lot 479 for five years, p. 63.
		16.	Assignment to Thomas Nichols, pp. 64–5.
	Aug.	9.	Carpenter's risk taken and policy 17,150 issued.
	Oct.	2.	Policy sued upon issued.

1866. Feb.	1.	Premises destroyed by fire.
June	18.	Summons issued in debt—in Circuit Court for Eastern District of Pennsylvania, to April sessions, 1866, No. 9.
Oct.	19.	Narr filed.
Nov.	5.	Demand for oyer filed.
	12.	Oyer furnished.
	14.	Pleas filed.
Dec.	7.	Replication filed.
	20.	Rejoinder filed.
	Eo die.	Additional pleas filed.
	27.	Replication to additional pleas.
	29.	Additional pleas filed.
1867. Jan.	10.	Replication to additional pleas.
	Eo die.	Notice to produce filed.
April	5.	Jury called.
	9.	Verdict for plaintiff, $4,200.
	17.	Motion for new trial.
	18.	Motion refused and judgment entered for plaintiff.

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